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85-1778

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States Court
Of Appeals for the Third Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

CHARLES M. OBERLY, III
Attorney General

FRED S. SILVERMAN
State Solicitor

JOHN J. POLK
Deputy Attorney General
Department of Justice
Carvel State Building
Wilmington, Delaware 19801

COUNSEL FOR APPELLANTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie Systems Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie Systems Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452-WKS
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

David S. Swayze, Esquire, William E. Manning, Esquire, James L. Holzman, Esquire, Wendie E. Cohen, Esquire, Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; Richard Keene, Esquire, John J. Higinbothom, Esquire, The Baltimore and Ohio Railroad Company, Baltimore, Maryland, Attorneys for Plaintiffs

John J. Polk, Esquire, Ellen R. Chaikin, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorney for Defendants

OPINION

Wilmington, Delaware
April 9, 1985

STAPLETON, Chief Judge:

The plaintiffs in this case, Baltimore & Ohio Railroad Company ("B&O"), the Baltimore & Philadelphia Railroad Company, Mount Clare Properties (Delaware), Inc. and Chessie Motor Express (collectively "the Chessie Group"), bring this action for declaratory and injunctive relief against defendants Charles M. Oberly, III, in his capacity as the Attorney General of the State of Delaware, and John E. Wilson, III, in his capacity as the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). Plaintiffs seek to restrain the defendants from the threatened application and enforcement of the Delaware Noise Control Act, 7 Del. C., Chapter 71 (the "Delaware Act") and regulations thereunder on the grounds that the Delaware regulatory scheme is unconstitutional.

On August 14, 1984, defendant Wilson advised B&O's attorneys that the Delaware Department of Justice was preparing an action seeking injunctive relief at the Wilsmere Intermodal Facility (the "Wilsmere Facility" or "the Facility") for alleged violation of the Delaware Act. In response, the plaintiffs filed this action on August 17, 1984, and immediately thereafter moved for a temporary restraining order. A hearing on that motion was held on August 20, 1984, and the motion was granted.

The case is currently before the Court on plaintiffs' motion for a preliminary injunction. The plaintiffs' request for preliminary injunctive relief will be granted.

I. FACTS

The Facility is a railroad terminal located in New Castle County, Delaware. Plaintiffs B&O and its subsidiary B&P conduct joint railroad operations at the Facility. The property is coowned by B&P and Mount Clare Properties.

Over the past three decades, technological changes in the railroad industry have led to an increase in "intermodal" operations, which reflect a "marriage" between the railroad and trucking industries. Intermodal transportation is accomplished through the use of trailers or containers on flat cars which may be hauled by truck or rail ("TOFC" and "COFC" respectively). The Wilsmere Facility commenced intermodal operations in October 1982.

Perishable goods and produce from southern growing regions, destined for northeastern market distribution, constitute a great portion of the traffic at the Facility. These goods are transported by refrigerated trailer units which employ continuous action generators or compressors to maintain a constant temperature and prevent spoilage. These trailers perform the functions formerly performed exclusively by railroad refrigerated box cars.

At an August 1, 1984 meeting convened to discuss noise emissions from the Wilsmere Facility, representatives of the Air Quality Section of DNREC advised plaintiffs' attorneys that the equipment over which there was most regulatory concern was the refrigerated trailers. A representative of DNREC further advised plaintiffs' attorney, Mr. Manning, that a noise attenuation level of 29 decibels was necessary to comply with the Delaware regulations.

The plaintiffs in turn consulted an expert concerning the feasibility of complying with the 29 decibel attenuation requirement advised by DNREC. Based on their expert's analysis, plaintiffs concluded that they would be forced to discontinue or dramatically reduce intermodal operations at the Wilsmere Facility if forced to comply with the 29 decibel noise reduction requirement.

II.

The test for determining whether a preliminary injunction should issue was set forth by the Third Circuit in *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1982):

> The moving party on a motion for a preliminary injunction must generally show (1) a reasonable probability of ultimate success on the merits of the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. In addition, the district court 'should take into account, when they are relevant (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest.' [citations omitted].

The first inquiry, therefore, is whether the plaintiffs have shown a reasonable probability of success on the merits of their request for injunctive relief after a full hearing.

A. Success On The Merits

The plaintiffs argue that the Delaware Act is invalid and unenforceable on three grounds: (1) the Delaware Act is preempted by the Federal Noise Control Act of 1972 and regulations promulgated thereunder; (2) enforcement of the Delaware Act would impermissibly burden plaintiffs' operations in interstate commerce in violation of the Commerce Clause; and (3) both the Delaware Act and its regulations are void for vagueness under the Fourteenth Amendment.

Since I find that the plaintiffs have demonstrated a reasonable probability of ultimate success on the merits of their preemption argument, I need not consider the arguments based on the Commerce Clause and the Fourteenth Amendment.

Based on the language and legislative history of the Noise Control Act of 1972, 42 U.S.C. §4901, the defendants concede that Congress generally intended to preempt the regulation of noise created by interstate railroads. Defendants contend, however, that the federal government, by choosing not to prescribe noise standards for certain activities at railroad facilities, has left a "regulatory gap" that leaves those activities free of federal regulation and subject to state control.

With a few minor exceptions, the federal railroad noise standards apply to all rail cars and all locomotives. 40 C.F.R. §201.10. The standards purport to apply particularly to all active

retarders, all car coupling operations, all switcher locomotives, all load cell test stands, and

> . . . the total sound level emitted by rail cars and locomotives operated under the conditions specified, including the sound produced by refrigeration and air conditioning units which are an integral element of such equipment.

Id. The regulations set out sound level standards for applicable activities.

The defendants point out that, notwithstanding their stated applicability to refrigerator units on rail cars, the regulations propound no standard for these units. The defendants maintain that the federal government's failure to promulgate standards for these units leaves the operation of noise emitting, motionless refrigerated trailers and containers free of federal control.[1]

To more fully understand the defendants' argument respecting the so-called "regulatory gap," it is necessary to briefly review the history of the pertinent regulations promulgated pursuant to the Act. This review necessarily entails consideration of *Association of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977).

In *Costle*, the plaintiff, Association of American Railroads, challenged the validity of the action of the Administrator of the EPA in promulgating under the Act railroad noise emission standards limited solely to rail cars and locomotives. Section 17 of the Act required the Administrator to establish emission standards for noise "resulting from operation of the equipment and facilities" of interstate rail carriers. 42 U.S.C. § 4916(1). The plaintiff in *Costle* argued that Section 17 required the Administrator to promulgate regulations for *all* of the "equipment and facilities" of interstate rail carriers. The EPA on the other hand argued that the Act vested the Administrator with discretion to determine

1. The pertinent regulations speak of rail cars equipped with refrigeration units. 40 C.F.R. § 201.10. The refrigerated trailers and containers at issue in the present case are not mentioned in the regulations. Defendants contend that the alleged regulatory gap created by the absence of standards for refrigerated rail cars also exists with respect to refrigerated trailers and containers, since the latter are the technological successors of the former.

which sources of railroad noise were to be regulated at the federal level. *Id*. at 1311.

The court of Appeals for the District of Columbia concluded that the EPA had misinterpreted the scope of the mandate of Section 17 of the Act through its "artificial and narrow" definition of "equipment and facilities." *Id*. at 1321. Indeed, the EPA had regulated only locomotives and rail cars, and had not regulated "facilities" at all. *Id*. at 1320. *Costle* concluded that the plain language of Section 17 of the Act did not permit the interpretation that Congress intended to vest discretion in the EPA to decide *which of the* equipment and facilities would be subject to regulation. *Id*. at 1315 (emphasis supplied by court). The court found that the reference to "equipment and facilities" was unambiguous and "subsumes *all* such equipment and facilities." *Id*.

The court in *Costle* did not, however, provide a definition for the phrase "equipment and facilities," but instead ordered the EPA to promulgate regulations in accordance with the meaning of "equipment and facilities" as that phrase is customarily used in the railroad industry. *Id*. at 1321.

On April 17, 1979, the EPA proposed regulations in response to the court's order in *Costle*. 44 Fed. Reg. 22960 (1979). In these proposed rules, the EPA suggested a specific standard limiting noise emissions for refrigerator cars. In addition, the EPA proposed property line standards to comply with *Costle*'s order requiring the regulation of noise emanating from railroad "facilities." In so doing, the EPA identified the significant noise sources that comprise the overall noise resulting from rail facilities. Among the noise sources identified were TOFC/COFC operations. 44 Fed. Reg. 22962.

However, neither the April 17, 1979 proposed specific standards for the noise generated by refrigerator cars, nor the proposed property line standards for noise emanating from facilities were ever adopted. The EPA promulgated the final standards for specific sources of railroad noise on January 4, 1980, and explicitly rejected promulgating a source standard for refrigerator cars at that time. 45 Fed. Reg. 1232, 1238 (1980). In the January 4, 1980 announcement, the EPA also stated its intention to defer

promulgation of final railyard property line standards pending further assessment of the extensive comments that it had received on those standards. *Id*. at 1256. In announcing that property line standards would be established at a future date, the EPA indicated that such property line regulations "will include the control of a wide variety of rail equipment and facilities associated with yard activity that is not specifically covered by the four source standards." *Id*.[2]

However, the property line standards were ultimately deemed unnecessary. The EPA withdrew further consideration of those standards. The Status Report of November 12, 1981, filed by the parties to the *Costle* litigation, stated the EPA's rationale for ultimately declining to adopt the proposed property line standards:

> Respondents believe that the cumulative effect of these standards [the final standards for specific sources of railroad noise, 45 Fed. Reg. 1252 (1980)], which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards.
>
> In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA

2. On September 30, 1980, EPA published "Notice of availability of new data and advance notice of intent." In that Notice, EPA expressed its intent to consider specific noise standards for "parked cars with mechanical refrigeration units, and trailer on flat car container on flat car facilities [TOFC/COFC]." 45 Fed. Reg. 64876-77 (1980).

> has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.[3]

In light of the foregoing history of the federal regulations controlling railroad noise, defendants "regulatory gap" argument must fail. It is clear that the EPA has expressly considered and rejected regulations of those noise sources that the State of Delaware seeks to control in the present case. Besides rejecting a proposed specific noise standard for refrigerator rail cars, the EPA also rejected proposed property line standards that were intended, in part, to regulate the noise generated by "TOFC/COFC" operations. The EPA concluded that the proposed property line standards were unnecessary, because the standards already controlling specific sources of railyard noise were deemed sufficient to control the noise emissions from rail facilities themselves.

The instant case is thus like those which recognize that a federal decision not to regulate has the same preemptive effect as a federal decision to regulate. As the Supreme Court has recognized on a number of occasions:

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.

Arkansas Elec. Co-Op. Corp. v. Arkansas Public Commission, 103 S.Ct. 1905, 1912 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977).

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3. On December 1, 1982, EPA published a formal "Withdrawal of proposed standards," in which it announced its determination to reject the proposed property line standards in accordance with the decision by the parties to the *Costle* litigation. 47 Fed. Reg. 54107-54108 (1982).

In support of its argument that the lack of a federal *noise* standard pertaining to refrigerated rail cars invites supplementary state regulation, the defendants point to the language of the preemption clause of the Act. In pertinent part the preemptive language of the Act recites:

> . . . after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

42 U.S.C. § 4916(c)(1). Defendants argue that, when read literally, the statute preempts state regulation of noise from the operation of equipment or facilities *only* where the noise is covered by a federal regulation. I cannot agree with the defendants' reading of the preemption clause, particularly where as here, the EPA expressly considered and rejected standards for those noise sources that the State of Delaware is now seeking to control. Adopting the construction of the preemption clause advocated by defendants would permit states to regulate railyard equipment and facilities whenever the federal government made the conscious decision that further regulation was unnecessary. Such a result would be at odds with the Act's express purpose to establish nationally uniform standards in the control of railroad and other major sources of noise. 42 U.S.C. § 4901(a)(3).

The defendants also argue that the EPA itself has acknowledged the existence of a federal regulatory gap in its standards relating to railyard noise into which the states may inject their own regulations. Defendants argue that the April 17, 1979 EPA proposal establishing a sound level standard for refrigerator car noise and a property line standard (which took into account the noise generated by TOFC/COFC operations) shows that the EPA did not read its existing regulations to apply to these noise

sources. While the defendants' argument may be correct insofar as it goes, it misses the most salient aspect of the history of the proposed standards relating to refrigerator car noise and property line standards, namely that the EPA rejected final promulgation of these standards because they were deemed *unnecessary*.

B. Irreparable Harm

The moving party on a motion for a preliminary injunction bears the burden of demonstrating an imminent threat of irreparable harm. *Punnett v. Carter*, 621 F.2d at 586. I conclude that the plaintiffs have net that burden in the present case.

On August 1, 1984, plaintiffs' attorneys met with representatives of DNREC to discuss noise emissions from the Wilsmere facility. At this meeting, the plaintiffs were informed by DNREC that the refrigerated trailers were the noise source of greatest regulatory concern. Charles Wilkins, a DNREC representative, also informed plaintiffs that a noise attenuation of 29 decibels was necessary to comply with Delaware regulations. Two weeks later, plaintiffs were informed by DNREC that on or about August 20, 1984, the State of Delaware would initiate an action seeking to enforce its Noise Control Act against plaintiffs' operations at the Wilsmere Facility. Plaintiffs were also informed at that time that the State's enforcement action would include a request for immediate injunctive relief.[4]

In order to determine the expense and difficulty of achieving the 29 decibel noise reduction required by the State, plaintiffs consulted Grant Anderson, a physicist and acoustical engineer who specializes in railroad and highway transportation noise and its mitigation. Anderson Aff. ¶3. Anderson concluded that a 29 decibel noise reduction could be obtained by: (1) employing yet to be designed enclosures that would envelope refrigeration units — a reduction of 7 dbA; (2) constructing a 20 foot high sound barrier along plaintiffs' northern property line — a reduction of 6 dbA; and (3) moving the trailers with refrigeration units to a location 600 feet from the spot at which the DNREC's

4. Affidavit of William Manning.

measurements were taken — the remaining 16 dbA reduction. Anderson Aff. ¶45.

This three phase compliance program was in turn reviewed by John Giles, the general manager for TOFC/COFC operations for plaintiff B&O. Giles Aff. ¶¶1, 28. Giles concluded that the Wilsmere facility would be forced to shut down completely if such compliance were required. Moreover, in the event of a shutdown, the B&O intermodal facilities in Philadelphia and Baltimore would not be available as feasible alternatives. The Philadelphia facility is physically incapable of absorbing the additional traffic; and, use of the Baltimore facility would entail the non-competitive additional costs of drayage to and from northeastern markets in and out of Baltimore. Giles Aff. at ¶25.

As to the obstacles preventing implementation of Anderson's three phase compliance program, Giles attested that the Wilsmere facility simply does not have the space necessary to permit removal of the refrigeration units to a location 600 feet from neighboring properties. *Id.* at ¶29. If forced to comply with the 600 foot relocation requirement, the facility would only have enough space to accommodate 40 refrigeration trailers. *Id.* at ¶29(A). While the daily average number of refrigeration units at the facility is thirty-three, *id.* at ¶18, during peak periods, the number of refrigeration units grows to one hundred twenty. *Id.* at ¶29(C).

In addition, the costs of the twenty foot sound barrier ($1.2 million), the costs of the enclosures that would envelop the refrigeration units, as well as the costs attributable to the increased labor and machinery that would be necessary to mount and remove the enclosures would price the Wilsmere Facility "out of the competition." *Id.* at ¶29(B).

Giles' contentions concerning the impact that a 29 decibel noise reduction requirement would have upon plaintiffs' operations at the Wilsmere Facility stand largely uncontradicted on the present record.

The defendants nonetheless raise several arguments. First, defendants contend that the plaintiffs cannot base their claim of irreparable harm on the ground that they would be forced to

reduce noise emissions at the Facility by 29 decibels. Defendants claim that the 29 decibel figure was not the basis of the contemplated state enforcement action.

The plaintiffs were informed by a representative of DNREC that compliance with the Delaware Act required noise abatement of 29 decibels; two weeks later, the plaintiffs were informed that the State of Delaware would shortly initiate an action under the Delaware Act against plaintiffs' operations at the Wilsmere Facility. There is no suggestion in the present record that defendants ever informed the plaintiffs that some calculation, other than the 29 decibel limitation, would form the basis of the threatened action. Under these circumstances, the plaintiffs are justified in basing their argument of irreparable harm upon the 29 decibel attenuation requirement.

The defendants further argue that the only harm facing the plaintiffs is the cost of litigating the threatened state enforcement action and that the costs of such litigation, as a matter of law, do not constitute irreparable harm. In addition, relying upon *A.O. Smith Corp. v. FTC*, 530 F.2d 515 (3d Cir. 1976), and this Court's decision in *Pharmaceutical Manufacturers Ass'n v.FDA*, No. 77-291, Slip Op. (D. Del. October 5, 1977), the defendants contend that, even if the losses facing the plaintiffs go beyond the mere costs associated with litigation, those costs amount to no more than loss of profits resulting from the costs of complying with a governmental regulation, and cannot, therefore, constitute irreparable harm.

Clearly, however, the plaintiffs have established that they face injury considerably greater than that associated with the mere costs of litigation.[5] I also conclude that the plaintiffs are

5. Defendants argue that the only immediate threat of irreparable injury which plaintiffs have shown is the threat of having to pay the legal expenses necessary to defend a state enforcement action. Implicit in this argument is the assumption that plaintiffs have available to them the option of continuing to do business as usual during the pendency of the threatened state court enforcement proceedings and that the only detriment to plaintiffs during this period will be the cost of their defense. This contention overlooks two things. First, the Delaware Regulations are self-enforcing in the sense that any violation of them is subject to a fine, with each day of noncompliance constituting a separate offense. "Willful" or "negligent" violations expose the violator to a fine of

threatened with harm that is greater than the mere loss of profits if preliminary relief does not issue.

Giles averred that the Wilsmere facility faces "numerous" direct and indirect area competitors in the transportation business. Giles Aff. ¶¶23-26. As previously noted, he also stated that the costs of compliance with Anderson's noise reduction plan would "price the facility out of the competition." Moreover, it would appear from Giles' assertions that, during "peak periods", the facility would no longer be able to accommodate a significant portion of its refrigeration trailer traffic. Giles asserted that the daily peak number of refrigerated trailers at the Facility was 120, but that the 600 foot relocation requirement would limit the Facility to a capacity of 40 such trailers.

The defendants have not seriously challenged Giles' assertions concerning the nature of the harm that would befall the Facility in the event compliance with the threatened 29 decibel noise reduction was required. I view this harm as considerably more serious than the mere loss of profits attendant upon compliance with a government regulation. *See Northern Natural Gas v. United States Dept. of Energy*, 464 F. Supp. 1145, 1158 (D. Del. 1979) (where this Court interpreted *A.O. Smith v. F.T.C.* as permitting a finding that lost profits can constitute irreparable harm if they are "peculiar", that is, if the lost profits constitute a loss greater than the "normal cost of doing business in today's world of government regulation.") The plaintiffs here face not only loss of revenue, but they stand to lose their competitive position in the northeastern region of the country, if, as Giles asserts, compliance with the threatened action would require increased rates for customers, as well as reduction in refrigerator trailer operations at the Facility.

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up to $3,000 per day. Second, the undisputed Manning affidavit indicates that when plaintiffs' counsel were advised by DNREC that it was about to initiate an enforcement action, they were also advised that immediate injunctive relief would be sought. The threat of coercive enforcement was thus real and imminent when this action was commenced. Plaintiffs sought protection from that threat in this Court, as it is conceded they had a right to do.

C. The Public Interest

In determining whether a preliminary injunction will issue, a court should, where relevant, consider the potential harm that a grant or denial of preliminary relief will have on the public interest and other interested parties. *Punnett v. Carter*, 621 F.2d at 582.

The defendants assert that the public interest favors the State's enforcement of its noise regulations. In support of their position, the defendants have submitted a number of affidavits by homeowners living near the Facility who complain that the noise from the Facility has adversely affected their lives in a variety of ways.

While these complaints of noise-related stress are not to be taken lightly, there is a competing and equally important public interest in the present case that favors issuance of preliminary injunctive relief.

In the Noise Control Act, Congress expressed the need for "national uniformity of treatment" in regulating major sources of noise. 42 U.S.C. §4901(a)(3). With respect to the control of railroad noise, Congress has attempted to ensure such uniformity by including a direct and express preemption clause in the statute. 42 U.S.C. §4916(c)(1). Implicit in this concern with national uniformity is Congress' perception that the public interest is best served by uniform noise regulations throughout the nation. In the absence of uniform regulations, carriers would be subject to a variety of differing state and local regulations, resulting in confusion and undue burdens upon the orderly flow of goods between the states. The disruption and alteration in operations that will occur at the Wilsmere Facility in the absence of preliminary relief is precisely the type of situation that Congress has determined is contrary to the public interest.

Based on the current record, I am unable to conclude that the harms suffered by the homeowners surrounding the Facility significantly outweigh the harm to the public interest that would result if the Facility and the interstate carriers using it were

forced to adjust their operations to the requirements of the Delaware Act.[6]

Defendants' final argument is that plaintiffs have abused their privileges under the Temporary Restraining Order, and therefore are not entitled to a preliminary injunction. Specifically, defendants claim that plaintiffs expanded their operation at the Wilsmere Facility after the Temporary Restraining Order went into effect.

"[T]he proper standard to determine the status quo is the last uncontested status which precedes the pending controversy." *American Can Co. v. Local U. 7420, United Steelworkers of America*, 350 F. Supp. 810, 812 (E.D. Pa. 1972) (citing *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940)). Based on the current record, defendants have failed to persuade me that the plaintiffs' conduct, while the TRO was in effect, was different from their conduct prior to the present dispute. While the plaintiffs may have expanded their operations, there is no evidence that their intention to do so prior to this controversy was not well known to defendants. More importantly, it would appear from defendants' own contentions that the physical expansion at the Wilsmere Facility of which they complain had begun prior to the defendants' threatened enforcement of the Delaware Act. *See* Defendants' Brief at 6.

For the foregoing reasons, plaintiffs' request for a preliminary injunction will be granted.

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6. In this regard, it should be noted that the Noise Control Act permits states to enforce regulations directed at railroad noise "if the Administrator, after consultation with the Secretary of Transportation, determines that such standard . . . is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." 42 U.S.C. §4916(c) (2) The defendants in the present case have not sought the EPA's permission to enforce their local noise regulations.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie Systems Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie Systems Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452-WKS
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

PRELIMINARY INJUNCTION

THIS 9th day of April, 1985, for the reasons set forth in the Court's Opinion filed this date,

IT IS ORDERED that the defendants, Charles M. Oberly, III, Attorney General of the State of Delaware, and John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware, their officers, agents, employees, successors, attorneys and all those

acting in concert or participation with them, are hereby preliminarily enjoined from the application, enforcement, and prosecution of the Delaware Noise Control Act, 7 Del. C. Chapter 71 and regulations thereunder, against plaintiffs until the final resolution of this lawsuit.

_____

United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5272

THE BALTIMORE AND OHIO RAILROAD COMPANY, d/b/a One of the Chessie System Railroads; THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, d/b/a One of the Chessie System Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., and CHESSIE MOTOR EXPRESS, INC.

—

v.

CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware

Charles M. Oberly, II and
John E. Wilson, III,

Appellants

On Appeal from the United States District Court for the District of Delaware
(D.C. Civil No. 84-0452)

Argued November 18, 1985
Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges*.

(Filed January 27, 1986)

WILLIAM E. MANNING, ESQ. (Argued)
DAVID S. SWAYZE, ESQ.
PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE
P.O. Box 1328
Wilmington, DE 19899
Attorneys for Appellees

F. HENRY HABICHT, II, ESQ.
Assistant Attorney General
Land and Natural Resources Division
LAWRENCE R. LIEBESMAN, ESQ.
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Attorneys for EPA

JOHN J. POLK, Esq. (Argued)
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
Attorney for State of Delaware

OPINION OF THE COURT

PER CURIAM:

In this appeal, we are presented with the question of whether the Delaware noise control statute and its regulations, as applied to activities at an interstate railroad facility, are pre-empted by the Federal Noise Control Act of 1972, even though the federal agency had not promulgated regulations to control noise emissions from railyard property lines, which included refrigerated rail cars and refrigerated trailers and containers (trailer on flat car/containers on flat car—TOFC/COFC). 7 Del. C. §7101 *et. seq.*: Noise Control Act of 1972, § 17, 42 U.S.C. § 4916.

We hold that the application of the Delaware noise control statute to the interstate railroad facility in issue is preempted by the federal noise control statute for the reasons noted in Judge Stapleton's opinion. *Baltimore and Ohio R. Co. v. Oberly*, 606 F. Supp. 1340 (D. Del. 1985). In addition, we note that, at our request, the General Counsel of the United States Environmental Protection Agency ("EPA") filed a memorandum of law addressing the EPA's views as to whether the Delaware statute is preempted. The EPA also agreed that section 17 of the Noise Control Act preempts the Delaware standard where EPA has adopted federal standards regulating noise from railroad facilities and, further, has considered and then declined to prescribe a federal property line standard for railroad facilities on the ground that it is unnecessary.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5272

THE BALTIMORE AND OHIO RAILROAD COMPANY, d/b/a One of the Chessie System Railroads; THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, d/b/a One of the Chessie System Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC; and CHESSIE MOTOR EXPRESS, INC.

v.

CHARLES M. OBERLY, III, Attorney General of the State of Delaware and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware

Charles M. Oberly, III and John E. Wilson, III,
Appellants

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 84-0452)

Present: HIGGINBOTHAM, SLOVITER and MANSMANN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel November 18, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 9, 1985, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

Clerk

January 27, 1986

Certified as a true copy and issued in lieu of a formal mandate on
February 18, 1986.

Test:

Chief Deputy Clerk, United States Court of Appeals, for the
Third Circuit.

RECEIVED
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U.S.C.A. 3.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees,*	:	
v.	:	No. 85-5272
CHARLES M. OBERLY, III and JOHN E. WILSON, III *Appellants.*	:	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that Charles M. Oberly, III and John E. Wilson, III, appellants in this matter, hereby appeal to the Supreme Court of the United States from the order, entered in this matter on January 27, 1986, affirming the imposition of a preliminary injunction by the United States District Court for the District of Delaware.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

DEPARTMENT OF JUSTICE

STATE OF DELAWARE

BY: _____

JOHN J. POLK
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
302-571-2467
Attorney for Appellants

Date: April 8, 1986

MR. POLK: I can't foresee any additional evidence, Your Honor, that would overcome the finding of the District Court that Delaware's laws — Delaware's regulations were preempted by the federal standard.

THE COURT: Did the parties stipulate that the record on the preliminary injunction would be the same as on final injunction, which we have seen on many cases?

MR. POLK: There was no specific stipulation as to that matter, Your Honor.

THE COURT: Would you be willing to stipulate to that now?

MR. POLK: Yes, Your Honor.

THE COURT: That we may look upon this case at our option as if it was really a hearing on final injunction?

MR. POLK: Yes, Your Honor.

THE COURT: Go ahead.

MR. POLK: Thank you. The one significant matter of fact that I want to bring to the Court's attention is the nature of the intermodal operation that occurs at Wilmington. Trailers are brought in on flat cars.

* * *

THE COURT: Okay.

THE COURT: Counsel on both sides, obviously, you knowthere is a different standard under which we review a case on appeal for a preliminary injunction than we review a case from a final injunction. It's my understanding from the argument which each side has made that you are willing for us to consider this case on the standards which one would evaluate a final injunction rather than a preliminary injunction because you would not contemplate putting on any further evidence. Are we correct in this understanding?

MR. MANNING: From our perspective, yes, Your Honor. We are quite happy to have the Court proceed on that basis.

MR. POLK: (inaudible) also, Your Honor.

Your Honor, I simply wish to address the EPA's position and the position adopted by the appellees that the cumulative effect of the EPA's regulation of the noise from the—from the individual items in the facility regulates the noise

* * *

CHAPTER 71. NOISE CONTROL AND ABATEMENT

Subchapter I. Nonvehicle Provisions

Sec.

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Subchapter I. Nonvehicle Provisions

§ 7101. Declaration of purpose.

(a) The General Assembly finds and determines that the people of this State are entitled to and should be ensured an environment free from noise which unnecessarily degrades the quality of their life; that the levels of noise often reach such a degree as to endanger the health, safety and welfare, jeopardize the value of property and erode the integrity of the environment of the people of this State.

(b) The General Assembly also finds that a substantial body of science and technology exists by which noise may be substantially abated; and that the dangers of excessive noise can be abated by the adoption and enforcement of noise standards embodied in regulations based upon these scientific and technological findings.

(c) The General Assembly also finds that the problem of combating noise involves a high degree of cooperation on the part of various state agencies and departments; this chapter makes specific provisions for such inter-agency cooperation. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, §1.)

§ 7102. Short title.

This chapter shall be known and may be cited as the Delaware Noise Control Act. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7103. Definitions.

(a) "Committee" shall mean the Noise Advisory Committee created under this chapter.

(b) "Farming operations" shall mean any activity which is involved in the production of agriculture, livestock, dairy or poultry products for sale.

(c) "Farm vehicle" shall mean a wheeled device used for transportation in farming operations.

(d) "Manufacturer" shall mean any person employing 5 or more employees and who is licensed as a manufacturer by the Department of Finance in accordance with Chapter 27 of Title 30.

(e) "Motor vehicle" shall mean any vehicle defined as a motor vehicle in accordance with § 101 of Title 21.

(f) "Noise" shall mean any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans, excluding all aspects of noise regulated by the federal Occupational Safety and Health Act (OSHA).

(g) "Noise disturbance" means any sound which:

(1) Endangers or injures the safety or health of humans or animals; or

(2) Annoys or disturbs a reasonable person of normal sensitivities; or

(3) Jeopardizes the value of property and erodes the integrity of the environment.

(h) "Person" shall mean any corporation, company, association, society, firm, partnership and any joint stock company, as well as individuals, and shall also include the State and all of its political subdivisions, agencies and instrumentalities as well as any department, board or agency of the government of the United States.

(i) "Secretary" shall mean the Secretary of the Department of Natural Resources and Environmental Control. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, § 1.)

§ 7104. Noise and noise disturbance prohibited.

(a) No person shall, without first having obtained a variance or a temporary emergency variance from the Department of Natural Resources and Environmental Control, undertake any activity which in any way may cause or contribute to the creation of noise or a noise disturbance.

(b) No person shall, without having first obtained a variance or a temporary emergency variance from the Department of Natural Resources and Environmental Control, construct, install, replace, modify or use any equipment, machinery, motor vehicle, device or other article which in any way may cause or contribute to the creation of noise or a noise disturbance. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1).

§ 7105. Administration of chapter; applicability of subchapter.

(a) The Secretary of the Department of Natural Resources and Environmental Control or his duly authorized designee shall exercise general supervision over the administration of this chapter and, in conjunction with the various law-enforcement agencies of this State, the enforcement of this chapter, and shall have jurisdiction over noise emanating from motor vehicles to the extent of approving standards, codes and regulations proposed by the Secretary of the Department of Public Safety.

(b) The Secretary of the Department of Public Safety shall exercise general supervision over the administration and enforcement of this chapter with regard to noise emanating from motor vehicles.

(c) This subchapter shall not apply to noise caused or created by the work of any public service company incident to the repair or maintenance of its equipment or facilities which may have been damaged or destroyed as the result of any emergency situation including but not limited to acts of God, accidents and explosions. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§ 7106. Powers and duties of Department of Natural Resources and Environmental Control.

The Department of Natural Resources and Environmental Control shall have the power and its duty shall be to:

(1) Adopt standards, rules and regulations, after public hearing, for the prevention, control, reduction and abatement of noise pollution, applicable throughout the State or to such parts or regions thereof specifically designated in such regulations. The procedure for public hearings shall conform to the procedure described in subdivision (2) of § 6006 of this title; such rules and regulations, however, shall not purport to exercise jurisdiction over any person or activity not included or affected by this subchapter;

(2) Cooperate with all other state departments, divisions and agencies in the formulation and preparation of rules and regulations for the control of noise;

(3) Enter into agreements with any other state department in order to effectuate this chapter;

(4) Enforce this chapter, and all regulations, codes and rules, promulgated pursuant thereto, except those provisions of this chapter pertaining to motor vehicles;

(5) In conjunction with the various law-enforcement agencies of this State, receive or initiate complaints of noise and institute legal proceedings for the prevention of noise and for the recovery of penalties, in accordance with this chapter.

(6) Keep records of violations cited, enforcement procedures initiated and completed in accordance with this section. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§ 7107. Authority of Department of Natural Resources and Environmental Control.

The Department of Natural Resources and Environmental Control shall have the authority to:

(1) Conduct and supervise research programs for the purpose of determining the causes, effects and hazards of noise;

(2) Conduct and supervise statewide programs of noise control education, including the preparation and distribution of information relating to noise control;

(3) Enter and inspect any building or place, except private residences, for the purpose of investigating an actual or suspected source of noise and ascertaining compliance or noncompliance of any statute, rule or regulation of Department. Any information relating to secret processes or methods of manufacture or production obtained in the course of such inspection, investigation or determination shall be kept confidential and shall not be admissible in evidence in any court or in any other proceedings except to the extent herein provided. If tests of any type are made for the purpose of determining whether or not a violation has occurred, or for any other purpose in connection with such entry and inspection, a duplicate of the results of the tests shall be furnished promptly to the person suspected of violating the statute, code or regulation;

(4) With the approval of the Governor, cooperate with and receive money from the federal government, the state government or any county or municipal government or from private sources for the study and control of noise; and

(5) Review and approve any plan to construct any highway corridor, the construction or operation of which may in the opinion of the Department cause or contribute to an amount of noise deemed excessive by the Department. (63 Del. Laws, c. 369, § 1.)

§ 7108. Enforcement; investigations; injunctive relief.

(a) The Department of Natural Resources and Environmental Control shall enforce this chapter and any duly promulgated rules and regulations. All law-enforcement agencies of this State,

including but not limited to police forces of the counties and incorporated cities and towns, may also enforce this chapter and any duly promulgated rules and regulations.

(b) Whenever the Department of Natural Resources and Environmental Control or any law-enforcement agency within this State has cause to believe based upon observation or a complaint that any person is violating this chapter, or any rules or regulations promulgated in accordance with this chapter, the Department or law-enforcement agency is authorized to conduct an investigation in connection therewith.

(c) If upon investigation the Department of Natural Resources and Environmental Control or any law-enforcement officer of this State discovers a condition which is in violation of any provision of this chapter or any rule or regulation promulgated pursuant thereto, the Department or law-enforcement officer shall be authorized to order such violation to cease and may take such reasonable steps as are necessary to enforce such an order. The order shall state why a violation exists and shall provide a reasonably specified time within which the violation must cease.

(d) The person responsible for the violation shall make the corrections necessary to comply with the requirements of this chapter or any rule or regulation promulgated pursuant thereto within the time specified in the order.

(e) Nothing herein shall be deemed to prevent the Department of Natural Resources and Environmental Control or any other law-enforcement agency of this State from prosecuting any violation of this chapter or any rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with the above order.

(f) In his discretion, the Secretary of the Department of Natural Resources and Environmental Control may endeavor by conciliation to obtain compliance with all requirements of this chapter or any rule or regulation promulgated pursuant thereto. Conciliation shall be attempted by giving written notice to the responsible party which:

(1) Specifies the violation;

(2) Proposes a reasonable time for its correction; and

(3) Advises that a cease and desist order may be issued or other action taken unless the violation is corrected.

(g) If a violation is threatening to begin, or is continuing, or if there is a substantial likelihood that it will reoccur, or if the Department of Natural Resources and Environmental Control receives information that a noise disturbance presents an imminent or substantial hazard to public health or to the environment, the Secretary of the Department of Natural Resources and Environmental Control may, in addition to or in lieu of any other remedy provided for in this chapter, seek a temporary restraining order or a preliminary or permanent injunction in the Court of Chancery.

(h) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance issued pursuant to this section or § 7109 of this title or any cease and desist order of the Secretary, shall be punished by a fine of not less than $25 nor more than $500 for each violation. Each day of violation shall be considered as a separate violation. Any court of competent jurisdiction shall have jurisdiction of offenses under this subsection.

(i) Any person who willfully or negligently violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance or any cease and desist order of the Secretary shall be punished by a penalty of not less than $500 nor more than $3,000 for each day of such violation. The Superior Court shall have jurisdiction of offenses under this subsection.

(j) It shall be a misdemeanor for any person to obstruct, hinder, delay or interfere with, by force or otherwise, the performance by personnel of the Department of Natural Resources and Environmental Control or any other enforcement personnel of any duty under this chapter, or any rule or regulation or order or permit or decision promulgated or issued thereunder. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7109. Variance.

(a) Any person who owns or operates any stationary noise source may apply to the Secretary of the Department of Natural Resources and Environmental Control for a variance or a partial variance from 1 or more of the rules or regulations promulgated pursuant to this chapter. Applicants for a variance shall supply information including, but not limited to:

(1) Information on the nature and location of the facility or process for which such application is made.

(2) The reason for which the variance is required, including the economic and technical justifications.

(3) The nature and intensity of noise that will occur during the period of the variance.

(4) A description of interim noise control measures to be taken by the applicant to minimize noise and the impacts occurring therefrom.

(5) A specific schedule of the best practical noise control measures, if any, which might be taken to bring the source into compliance with those regulations from which a variance is sought, and a statement of the length of time during which it is estimated that it will be necessary for the variance to continue.

(6) Any other relevant information the Department may require in order to make a determination regarding the application.

(b) Failure to supply the information required shall be cause for rejection of the application unless the applicant supplies the needed information within 30 days of the written request by the Department for such information.

(c) No variance shall be approved unless the Secretary finds that:

(1) Noise levels occurring during the period of the variance will not constitute a danger to the public health; and

(2) Compliance with this chapter and any duly promulgated rules or regulations would impose an arbitrary or unreasonable hardship upon the applicant without a commensurate benefit to the public.

(d) In determining whether to grant a variance, the Secretary shall consider:

(1) The character and degree of injury to, or interference with, the health and welfare of people or the reasonable use of property which is caused or threatened to be caused by the noise during the variance period.

(2) The social and economic value of the activity for which the variance is sought.

(3) The ability of the applicant to apply best practical noise control measures, as defined in duly promulgated regulations.

(e) Following receipt and review of an application for a variance, and after publishing notice once a week for 2 weeks in a newspaper of general circulation in the county wherein the variance is proposed, the Department shall, if necessary, fix a date, time and location for a hearing on such application in accordance with § 6004 of this title. Costs of newspaper advertising are to be paid by the applicant.

(f) Within 10 days of the receipt of the record of a hearing on a variance application, or within 10 days of receipt of an application on which no hearing is held, the Department shall issue its determination regarding such application and provide a copy to affected parties. All such decisions shall briefly set forth the reasons for the decision.

(g) The Department may, in its discretion, limit the duration of any variance granted. Any person holding a variance and needing an extension of time may apply for a new variance under this chapter and any duly promulgated rules and regulations for a period not to exceed 1 year. Any such application shall include a certification of compliance with any condition imposed under the previous variance.

(h) The Department may attach to any variance any reasonable conditions it deems necessary and desirable, including, but not limited to:

(1) Requirements for the best practical noise control measures to be taken by the owner or operator of the source to minimize noise during the period of the variance.

(2) Requirements for periodic reports submitted by the applicant relating to noise, to compliance with any other conditions under which the variance was granted or to any other information the Department deems necessary.

(i) A variance may include a compliance schedule and requirements for periodic reporting of increments of achievement of compliance. (63 Del. Laws, c. 369, § 1.)

§ 7110. Temporary emergency variance.

(a) A temporary emergency variance may be granted by the Department:

(1) If a severe hardship would be caused by the time period involved in obtaining a full variance.

(2) If the emergency is of an unforeseen nature so as to preclude a full variance because of time limitations.

(3) If all conditions comply with those required for a full variance.

(4) For a period not to exceed 60 days, not to be extended more than once.

(b) The granting of any temporary emergency variance shall be published within 5 days of the granting in a newspaper of general circulation once a week for 2 weeks in the county where the applicant resides. (63 Del. Laws, c. 369, § 1.)

§ 7111. Testimony at hearings.

Testimony taken at any hearing shall be under oath and recorded stenographically, but the parties shall not be bound by

the strict rules of evidence prevailing in the courts of law and equity. True copies of any transcript and of any other record made of or at such hearings shall be furnished to any party thereto upon request, and at his expense. Applicants shall pay for any and all stenographer's fees and, if requested, copies of the transcript. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.

§7112. Conduct of hearings.

Any administrative or nonjudicial hearings required by this chapter shall be held before the Secretary of the Department of Natural Resources and Environmental Control or before members of the Department designated by the Secretary. The Secretary, or persons designated by him to hear the case, shall have the power to subpoena witnesses and compel their attendance, administer oaths and require the production for examination of any books or papers relating to any matter under investigation in any such hearing. The respondent to a complaint made by it, or to it, pursuant to this chapter, shall subpoena and compel the attendance of such witnesses as the respondent may designate and require the production for examination of any books or papers relating to any matter under investigation in any such hearing. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7113. Appeals of final orders.

(a) Any person or persons who jointly or severally are substantially affected and aggrieved by any final order or variance of the Department, or any taxpayer, or any officer, department, board or bureau of the State may appeal that order to the State Environmental Appeals Board and to the Superior Court as provided in §§ 6008 and 6009 of this title except that the word "variance" shall be substituted for the word "permit" in subsections (b) and (e) of § 6008 of this title.

(b) No appeal shall operate to stay automatically any action of the Secretary, but upon application, and for good cause, the Secretary or the Court of Chancery may stay the action pending disposition of the appeal. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§7120. Powers and duties of Department of Public Safety.

(a) The Department of Public Safety, after consideration with the Secretary of the Department of Transportation and upon approval of the Secretary of the Department of Natural Resources and Environmental Control, shall have the power and its duty shall be to:

(1) Adopt regulations, after public hearing, establishing the standards, test procedures and instrumentation to be utilized in the control of noise from motor vehicles;

(2) Adopt regulations, after public hearing, necessary for the inspection of motor vehicles, including noise control and abatement equipment to assure compliance with the noise standards promulgated by the Department.

(b) For any public hearings required by this subchapter, the procedure shall conform to the procedure established in §6006 of this title. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

Subchapter II. Motor Vehicles

§7121. Motor vehicle noise inspection.

Any motor vehicle which is subject to inspection by the Division of Motor Vehicles or any other duly authorized body shall, as a condition of compliance with said inspection, pass such tests as may be required to demonstrate that the motor vehicle is in compliance with all state and federal standards and requirements for the control of noise which are applicable to such motor vehicles (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7122. Motor vehicle violations; enforcement.

Any person who operates a motor vehicle or owns a motor vehicle which he permits to be operated upon public highways of this State which generates noise in excess of standards adopted by the Department of Public Safety shall be fined not less than $25 nor more than $1,000, which shall be enforced in accordance with Chapter 7 of Title 21. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7123. Liberal interpretation.

The powers, duties and functions vested in any state department under this chapter shall not be construed to limit in any manner the powers, duties and functions vested therein or in any person under any other provision of law, or any civil or criminal remedies now or hereafter available to any person related to community noise control. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7124. Other ordinances or remedies.

(a) No existing civil or criminal remedy now or hereafter available to any person shall be superseded by this chapter or any rule or regulation promulgated pursuant thereto.

(b) No ordinances or resolutions of any governing body of a municipality or county or board of health which establish specific standards for the level or duration of community noise equivalent to or more stringent than those provided by this chapter or any rule or regulation promulgated pursuant thereto shall be superseded. Nothing in this chapter or in any rule or regulation promulgated pursuant thereto shall preclude the right of any governing body of a municipality or county board of health to adopt ordinances, resolutions or regulations which establish specific standards for the level or duration of community noise equivalent to or more stringent than this chapter or any rule or regulation promulgated pursuant thereto. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7125. Exemptions.

(a) All farm vehicles are exempted from this chapter while engaged in farming operations.

(b) Sirens operated to summon volunteer firemen to alarms and sirens used to summon ambulance crews to service calls are exempted from this chapter. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF ENVIRONMENTAL CONTROL
AIR RESOURCES SECTION
EDWARD TATNALL BUILDING
P.O. BOX 1401
DOVER, DELAWARE 19901
Telephone (302) 736-4791

Pursuant to Provisions of
Part VII, 7 *Del. C.*, Chapter 71, Section 7105
Regulations Governing the Control of Noise
Per Order No. 82-A-2 of January 20, 1982
As Amended July 8, 1982

Sec. 71-I-1 Short Title

These regulations may be cited as the "Noise Regulations of the State of Delaware".

Sec. 71-I-2 Scope

Pursuant to the provisions of Part VII, Title 7, Chapter 71 of the Delaware Code, these regulations are to prevent, prohibit and provide for the abatement of excess and unnecessary noise and/or vibration which may endanger the health, safety and welfare, jeopardize the value of property and erode the integrity of the environmental [sic] of the people of this state.

Sec. 71-I-3 Definitions

3.0.1 "Ambient Noise" means the all-encompassing background noise associated with a given environment without the sound contribution of the specific source in question.

3.0.2 "A-Weighted Sound Level" means the sound pressure level in decibels as measured with a sound level meter using the A-weighting network, which compensates for human hearing characteristics. The level so read is designated dB(A) or dBA.

3.0.3 "Best Practical Noise Control Measures" means noise control devices, technology, and procedures determined or approved by the Secretary to be the best practical, taking into consideration the age of the equipment and facilities involved, the process employed, capital expenditures, maintenance cost, technical feasibility and the engineering aspects of the applicable noise control techniques in relation to the control achieved and the non-noise control environmental impact.

3.0.4 "Commercial Area" means land used for purposes such as retail sales, personal services, civic centers, hotels, offices and office buildings, wholesale and warehouse storage.

3.0.5 "Construction" means any site preparation, assembly, erection, placement, demolition, substantial repair, alteration or similar action for public or private rights-of-way, structures, utilities or similar property.

3.0.6 "Day" means the hours between 7:00 a.m. and 10:00 p.m.

3.0.7 "Day-Night Average Sound Level (Ldn)" means the 24-hour energy average of the A-weighted sound pressure level, with the levels during the period 10:00 p.m. to 7 a.m. weighted by 10 dBA before averaging.

3.0.8 "Decibel (dB)" means a standard unit for measuring the sound pressure level. It is equal to 20 times the logarithm to the base 10 of the ratio of the pressure of the sound measured to a reference pressure, which is 20 micropascals.

3.0.9 "Emergency" means any occurrence or set of circumstances involving actual or imminent physical trauma or property damage which demands immediate actions.

3.0.10 "Equivalent A-Weighted Sound Level, abbreviated Leq(x)dB(A), means the constant sound level that, in a given situation and time period (x), contains the same sound energy as the actual time-varying A-weighted sound.

3.0.11 "Farm Vehicle" means a wheeled device used for transportation in farming operations.

3.0.12 "Hertz (Hz) means a unit of measurement of frequency formerly stated as, and numerically equal to, cycles per second.

3.0.13 "Impulse Sound" means sound of short duration, much less than one second, with an abrupt onset and rapid decay, separated in time by at least one second.

3.0.14 "Industrial Area" means land used for purposes such as publishing, research, development, testing, manufacturing, processing, fabricating or repairing, and may include residential land use, for a caretaker, watchman or janitor.

3.0.15 "Infrasonic Sound" means sound pressure levels having frequencies below 16 Hz.

3.0.16 "Intrusion Alarm" means a device with an audible signal which, when activated, indicates intrusion by an unauthorized person.

3.0.17 "Intrusive Noise" means unwanted sound which intrudes over and above the existing noise at a given location. The relative intrusiveness of the sound depends upon its amplitude, duration, frequency, time of occurrence and tonal or informational content as well as the prevailing ambient noise level. A sound pressure level of 3 dB(A) above the ambient level is normally just discernable, with levels of 5 dB(A) to 10 dB(A) the lower level region for complaints.

3.0.18 "Motorboat" means any vessel which operates on water and is propelled by machinery.

3.0.19 "Night" means the hours between 10:00 p.m. and 7:00 a.m.

3.0.20 "Noise" means any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans, excluding all aspects of noise regulated by the Federal occupational Safety and Health Act.

3.0.21 "Noise Disturbance" means any sound which (a) endangers or injures the safety or health of humans or animals, or (b) annoys or disturbs a reasonable person of normal sensitivities, or (c) jeopardizes the value of property and erodes the integrity of the environment. Compliance with Sec. 71-I-6 herein shall constitute elimination of a noise disturbance.

3.0.22 "Octave" means the interval embracing eight diatonic degrees between two sounds having a basic frequency ratio of two. (One unit of the musical scale).

3.0.23 "Percentile Level" means the sound levels exceeded for the percentage of time in any measured period. L10, L50 and L90, the levels exceeded for 10%, 50% and 90% of the time, are frequently used as measures of peak, average and ambient levels respectively.

3.0.24 "Person" means any individual(s), corporation, company, association, society, firm, partnership or joint stock company, and includes the State and all of its political subdivisions, agencies and instrumentalities as well as any department, board or agency of the government of the United States.

3.0.25 "Pure Tone" means any sound which can be distinctly heard as a single pitch or a set of single pitches. For the purpose of this section, a pure tone shall exist if the one-third octave band sound pressure level in the band with the tone exceeds the arithmetic average of the sound pressure levels of the two contiguous one-third octave bands by 15 dB for bands with center frequencies less than 160 Hz, by 8 dB for bands with center frequencies of 160 Hz to 400 Hz, and by 5 dB for bands with center frequencies greater than 400 Hz.

3.0.26 "Real Property Boundary" means an imaginary line along the ground surface, and its vertical extension, which separates the real property owned by one person from that owned by another person, but not including intra-building real property divisions.

3.0.27 "Residential Area" means land used for the primary purpose of providing human living accommodations.

3.0.28 "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

3.0.29 "Sound" means an oscillation in pressure, particle displacement, particle velocity or other physical parameters, in a medium with internal forces that causes compression and rarefaction of that medium. The description of sound may include any characteristic of such sound, including duration, intensity and frequency.

3.0.30 "Sound Amplifying Equipment" means any device for increasing the magnitude of the human voice, music or other sound.

3.0.31 "Sound Level" means the sound pressure level (SPL) obtained by the use of a sound level meter and frequency weighting network, such as A, B or C as specified in American National Standards Institute specifications for sound level meters (ANSI S1.4-1971, or the latest approved revision thereof). The unit of measurement is the decibel. If the frequency weighting employed is not indicated, the A-weighting shall apply.

3.0.32 "Sound Pressure" means the instantaneous difference between the actual pressure and the average or barometric pressure at a given point in space, as produced by sound energy.

3.0.33 "Stationary Noise Source" means a device which creates sound while fixed in position, including but not limited to residential, commercial or industrial machinery, pumps, fans, compressors, air conditioners and refrigeration equipment.

3.0.34 "Ultrasonic Sound" means sound pressure levels having frequencies above 20,000 Hz.

3.0.35 "Vibration" means an oscillatory motion of solid bodies of deterministic or random nature described by displacement, velocity, or acceleration with respect to a reference point, such that;

$v = 2\pi f d$ where v = Velocity, f = Frequency and d = Peak Displacement
$a = 2\pi f v$ where a = Acceleration Amplitude

3.0.36 "Weekday" means any day Monday through Friday which is not a legal holiday.

Sec. 71-I-4 Prohibited Acts

4.0.1 Noise Disturbance Prohibited — No person shall make, continue, or cause to be made or continued, any noise disturbance. Non-commercial public speaking and public assembly activities conducted on any public space or public right-of-way shall be exempt from this section, provided they conform to all local ordinances.

4.0.2 Specific Prohibitions

(1) Radios, Television Sets, Musical Instruments and Similar Devices — Operating, playing or permitting the operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier, automobile radio, automobile stereo or high fidelity equipment or similar device which produces, reproduces or amplifies sound:

(a) In such a manner as to create a noise disturbance within a receiving property.

(b) In such manner as to create a noise disturbance within any receiving property when operated in or on a motor vehicle on a public right-of-way or public space, or in a boat on public waters.

(c) In such manner as to create a noise disturbance to any person other than the operator of the device, when operated by any passenger on a common carrier.

(2) Animals and Birds — Owning, possessing, harboring or controlling any animal or bird which barks, bays, cries, squawks or makes any other noise continuously or *incessantly for a period of ten minutes* or makes such noise *intermittently for one-half hour* or more causing a noise disturbance within a receiving property; provided, however, that at the time the animal or bird is making such noise no person is trespassing or threatening to trespass upon private property in or upon which the animal or bird is situated or for any other legitimate cause which teased or provoked the animal or bird.

(3) Loading or Unloading — Loading, unloading, opening, closing, or other handling of boxes, crates, containers, building materials, garbage cans, or similar objects between the hours of 10:00 p.m. and 7:00 a.m. the following day in such manner as to cause a noise disturbance within a Class A receiving property. This section shall not apply during an emergency.

(4) construction — Operating or permitting the operation of any tools or equipment used in construction, drilling, or demolition work:

(a) Between the hours of 10:00 p.m. and 7:00 a.m. the following day, on weekdays and Saturdays, or at any time on Sundays or holidays, such that the sound therefrom creates a noise disturbance within a Class A receiving property, except during an emergency.

(b) At any other time such that the sound level within any receiving property exceeds an Leq of 85 dBA for a period of one hour.

(c) This section shall not apply to the use of domestic power tools subject to Section 4.0.2(8).

(5) Vehicle, Motorboat, or Aircraft Repairs and Testing — Repairing, rebuilding, or testing any motor vehicle, motorcycle, motorboat, or aircraft in such a manner as to cause a noise disturbance within a Class A receiving property between the hours of 10 p.m. and 7 a.m.

(6) Places of Public Entertainment — Operating, playing, or permitting the operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier or any other device which produces, reproduces, or amplifies sound within any place of public entertainment at a sound level greater that 85 dB(A) as read by the slow response on a sound level meter at any point that is normally occupied by a customer unless a conspicuous and legible sign is located outside such place, near each public entrance stating "WARNING: SOUND LEVELS WITHIN MAY CAUSE PERMANENT HEARING IMPAIRMENT". All places of public entertainment shall also be required to comply with all of the provisions of this Regulation, specifically Section 6.

(7) Explosives, Firearms, and Similar Devices — The use or firing of explosives, firearms or similar devices which create impulsive sound so as to cause a noise disturbance

within a Class A receiving property or on a public right-of-way, except for licensed game-hunting activities on property where such activities are authorized.

(8) Domestic Power Tools — Operating or permitting the operation of any mechanically powered saw, drill, sander, grinder, lawn or garden tool, snowblower, or similar device in residential areas between the hours of 10:00 p.m. and 7:00 a.m. so as to cause a noise disturbance within a Class A receiving property.

(9) Tampering

(a) No person shall operate any equipment unless all noise and/or vibration control devices installed thereon are in full operation.

(b) No person shall tamper with, circumvent or remove any sound level monitoring instrument, meter or device positioned by or for the Department.

(c) No person shall remove or deface a noise label on any product.

4.0.3 Motor Vehicle Prohibitions.

(1) Motor Vehicle and Motorcycles on Public Rights-of-Way — No person shall operate or cause to be operated a public or private motor vehicle or motorcycle, or any equipment attached to such a vehicle, on a public right-of-way at any time in such a manner that the sound level emitted by the motor vehicle or motorcycle, or any equipment attached to such a vehicle, exceeds the level set forth in Title 7, Chapter 71, Subchapter II, Delaware Motor Vehicle Noise Regulations.

(2) Standing Motor Vehicles and Motorcycles — No person shall operate or permit the operation of any motor vehicle, motorcycle, or any auxiliary equipment attached to such a vehicle in such a way as to cause a noise disturbance within a Class A receiving property, for a period longer than twenty minutes in any hour while the vehicle is stationary,

for reasons other than traffic congestion. (Also see Sec. 71-I-4.02 (3) Loading or Unloading).

(3) Unnecessary Horn Blowing — No person shall at any time sound the horn or other warning device of a vehicle in such a way as to cause a noise disturbance within a Class A receiving property except when absolutely necessary as a warning while actually driving such vehicle.

Sec. 71-I-5 Classification of Land According to Use

5.01 Class A noise zone

Lands designated Class A shall generally be residential areas where human beings sleep or areas where serenity and tranquility are essential to the intended use of the land.

The land uses in this category shall include, but not be limited to, single and multiple family homes, hotels, prisons, hospitals, religious facilities, cultural activities, forest preserves, and land intended for residential or special uses requiring such protection.

5.0.2 Class B noise zone

Lands designated Class B shall generally be commercial in nature, areas where human beings converse and such conversation is essential to the intended use of the land.

The land uses in this category shall include, but not be limited to, retail trade, personal, business and legal services, educational institutions, government services, amusements, agricultural activities, and lands intended for such commercial or institutional uses.

5.0.3 Class C noise zone

Lands designated Class C shall generally be industrial where protection against damage to hearing is essential, and the necessity for conversation is limited.

The land uses in this category shall include, but not be limited to, manufacturing activities, transportation facili-

ties, warehousing, military bases, mining, and other lands intended for such uses.

5.0.4 Mixed Class Noise Zone

Good land planning arranges for Class A zones to be buffered from Class C zones by a Class B zone. Some areas are mixed zones in practice, wherein Class C land uses abut, adjoin or include Class A use. Whenever this situation comes to the attention of the Department, the person responsible for the objectionable noise source shall make every effort to conform with Section 71-I-6. A final acceptable noise limit shall be determined by the Secretary based on Best Practical Noise Control Measures.

Sec. 71-I-6 Maximum Noise and Vibration Limits

6.0.1 No person(s) shall operate or cause to be operated *any stationary source* of sound in such a manner as to create a 24-hour equivalent A-weighted sound level which exceeds the Leq limits set forth for the receiving land use category in Table 1 when measured at the point of complaint origination within the property boundary of the receiving land use. Any excedence of these values shall constitute a noise disturbance.

Table 1 Sound Levels by Receiving Land Use Zones, Leq (24) dBA

Emitter(s)	Receptor C	Receptor B	Receptor A 7 a.m. - 10 p.m.	Receptor A 10 p.m. - 7 a.m.
A	65	65	65	55
B	75	75	65	55
C	85	75	65	55

6.0.2 INTRUSIVE NOISE LEVEL

NOT WITHSTANDING THE PROVISIONS OF SECTION 6.0.1, A SOURCE SHALL BE CONSIDERED TO CAUSE A NOISE DISTURBANCE IF THE SOUND

LEVEL, OTHER THAN AN IMPULSE, INFRASONIC OR ULTRASONIC SOUND, EMITTED BY SUCH SOURCE EXCEEDS THE AMBIENT NOISE LEVEL BY 10 dBA WHEN MEASURED AT THE POINT OF COMPLAINT ORIGINATION WITHIN THE RECEIVING PROPERTY.

Note: The relative intrusiveness of sound depends upon its amplitude, duration, frequency, time of occurrence and tonal or informational content as well as the prevailing ambient noise level. A sound pressure level of 3 dB(A) above the ambient level is normally just discernable, with levels of 5 dB(A) to 10 dB(A) the lower level region for complaints.

Sec. 71-I-7 Exceptions.

Exempted from these regulations are:

7.0.1 FAA Controlled Operations — Noise directly caused by aircraft flight operations specifically preempted by the Federal Aviation Administration.

7.0.2 Recreational, Sports and Musical Activities — Noise created by the use of property for the purposes of recreational, sports or musical activities, provided such exemption is effective only during the specific period of time authorized by the political subdivision or government entity having lawful jurisdiction to sanction such use.

7.0.3 Emergencies — Noise created as a result of, or related to, an emergency, including (a) the emission of sound for the purpose of alerting persons to the existence of an emergency, or (b) the emission of sound in the performance of emergency work.

7.0.4 Emergency Signaling Device Tests —

(a) Testing of emergency signaling devices the same time of day each time such tests are performed, using a minimum cycle test time.

(b) Testing of the complete emergency signaling system, including the function of signaling devices and the personnel response to the signal, shall not occur more than once in each calendar month.

7.0.5 Religious Activities — Sounds created by bells, ca illons or chimes associated with religious observances.

7.0.6 Public Celebrations — Patriotic or public celebratio not extending more than one day or as authorized by the publ subdivision or government entity empowered to sanction suc activity.

7.0.7 Farm — All farm vehicles are exempt while engage in farming operations.

7.0.8 The Unamplified Human Voice — including childre at schools, playgrounds, etc.

7.0.9 Interstate Railway Locomotives and Rail Cars —Noi directly caused by railway operations specifically preempted b the Federal Government.

Sec. 71-I-8 Validity of Regulations

If any section or subsection of these regulations is foun invalid, the remainder shall continue to be valid and enforc able.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie System Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie System Railroads, MOUNT CLAIRE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware and JOHN E. WILSON, III Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

STIPULATED FACTUAL MEMORANDUM

DATED: January 7, 1985

PRICKETT, JONES, ELLIOTT,
KRISTOL & SCHNEE
David S. Swayze
William E. Manning
Wendie E. Cohen
1310 King Street, P.O. Box 1328
Wilmington, Delaware 19899

Richard C. Keene, OF COUNSEL
General Attorney
The Baltimore and Ohio
Railroad Company
100 N. Charles Street
Baltimore, Maryland 21201
(301) 237-3121

ATTORNEYS FOR PLAINTIFFS

Fred S. Silverman
State Solicitor, State of Delaware

Michael T. Foster
John J. Polk
Deputy Attorneys General
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19899
Phone (302) 571-2520

ATTORNEYS FOR
DEFENDANTS

The parties, by their counsel, hereby stipulate to the following matters:

I. GENERAL

A. Parties

1. The Baltimore and Ohio Railroad Company (herein designated "B&O"), is a corporation organized under the laws of the State of Maryland, for the interstate transportation of goods and persons by rail, with its principal place of business in Baltimore, Maryland, doing such interstate business in and through parts of Delaware as one of the Chessie System Railroads.

2. The Baltimore and Philadelphia Railroad Company (designated herein as "B&P"), is a corporation of the Commonwealth of Pennsylvania and of the State of Delaware and is a 99.85% subsidiary of B&O.

3. B&P owns property within the State of Delaware, New Castle County, including some which constitutes a portion of the intermodal facility which is the subject of this litigation.

4. Chessie Motor Express, Inc. (designated herein as "CMX") is a corporation of the State of Delaware with its principal place of business in Cherry Hill, New Jersey and is a licensed interstate motor carrier (ICC No. MC-152-494) of goods and freight.

5. Mount Clare Properties (Delaware), Inc. (herein designated as "MCP", is a corporation of the State of Maryland with its principal place of business in Richmond, Virginia. MCP is not a surface carrier engaged in interstate commerce.

6. MCP owns property within the State of Delaware, New Castle County, which constitutes a portion of the intermodal facility which is the subject of this litigation.

7. B&O is controlled (98.51%) by The Chesapeake and Ohio Railway Company (herein designated as "C&O), a Virginia corporation, non-plaintiff, and an interstate rail carrier. Both B&O and C&O trade as "Chessie System Railroads." C&O also owns and controls (100%) CMX. C&O is in turn owned and controlled (100%) by CSX Corporation (herein "CSX"), a Virginia corporation and not a plaintiff herein. CSX also owns and controls (100%) Seaboard System Railroad, Inc. (herein "SBD"), a Virginia corporation, non-plaintiff, and also an interstate rail carrier.

8. CSX, a publicly traded holding company which resulte from the 1980 merger of Chessie System, Inc. and Seaboar Coast Line Industries, Inc., also owns and controls CSX Re sources, Inc., a Virginia corporation and a non-plaintiff, which i turn controls MCP.

9. Charles M. Oberly, III, ("Oberly") is the Attorney Ger eral of the State of Delaware, and, as such, is charged with th duty to enforce the Delaware Noise Control Act, 7 *Del.C*. Sec tion 7106(5).

10. John E. Wilson, III ("Wilson") is the Secretary of th Department of Natural Resources and Environmental Contro ("DNREC") of the State of Delaware and, as such, is charge with the duty to enforce the Delaware Noise Control Act, *Del.C*. Section 7106(4) and (5); Section 7108(a).

11. Wilson advised B&O's attorneys on August 14, 198 that Oberly's office was preparing a Complaint seeking injunc tive action against B&O, CMX et al. at the Wilsmere Intermoda Facility for alleged violation of regulations of DNREC and of th Delaware Noise Control Act.

B. Jurisdiction and Venue.

1. This court has jurisdiction over the subject matter of thi action under 28 U.S.C. Section 1331, in that Federal statutor and constitutional questions are presented, and under 28 U.S.C Section 2201 ("Declaratory Judgment Act").

2. Venue is properly laid in this judicial district, pursuant t 28 U.S.C. Section 1391, in that all defendants reside or do bus ness in this district, the claim arose in this district, and th facility sought to be regulated lies in New Castle County Delaware.

II. STATUTORY AND REGULATORY HISTORY

A. Federal Noise Control Act, and Regulations Thereunder Applicable to Railroad Equipment and Facilities

1. The Federal Noise Control Act, now Title 42, Sections 4901 through 4918, was enacted October 27, 1972, Public Law 92-574.

2. Legislative history is contained in 1972 U.S. CODE CONG. & AD. NEWS, 4655-4698. Original statute proposed as S.1160, February 19, 1971. Similar Bill proposed as H.R. 11021 on September 30, 1971, and favorably reported February 19, 1972. Second Senate version introduced as S.3342, March 14, 1972 (Senators Tunney and Muskie). S.3342 contained the first language relative to interstate carriers (air, rail, motor). Senate and House Committee Hearings, and Joint Committee Hearings held February 29, 1972 through October 18, 1972. S.3342 version, blended with H.R. 11021 and as amended, passed by Committee on Public Works October 13, 1972 and by Senate and House on October 18, 1972.

3. February 1, 1973; Advance Notice of Proposed Rulemaking, adding 40 C.F.R. pt. 201, proposed by Federal Environmental Administration (hereinafter "EPA"); 38 Fed. Reg. 3086-3087 (1973).

4. January 31, 1974; August 16, 1974; responses and comments of the Federal Department of Transportation (hereinafter "FDOT") filed regarding the rules proposed by the Advance Notice.

5. July 3, 1974; EPA proposed Emission Standards concerning Railroad Noise, 40 C.F.R. pt. 201 §§ 201.1, 201.10-201.13; 39 Fed. Reg. 24580-24588 (1974).

6. August 14, 1974; Public Consultation Meeting scheduled by EPA at Des Plaines, Illinois to provide a forum for interested parties to exchange information and views with each other and the agency respecting the interests of the following sectors: State and local governments, industry parties, environmental parties and private citizens. Meeting Notice, 39 Fed. Reg. 28316 (1974).

7. August 19, 1974; the Association of American Railroads (hereinafter "AAR") filed comments and certain objections to the

formally proposed rules. See *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.D.C. 1977).

8. July 14, 1975; further comments of FDOT filed concerning the formally proposed rules of July 31, 1974 *Id.*

9. January 14, 1976; Results of compliance meetings released, and revised Final Railroad Noise Emission Standards, 40 C.F.R. pt. 201 §§ 201.1, 201.10-13, 201.20-201.24, 41 Fed. Reg. 2184-2197 (1976).

10. April 14, 1976; Petition filed by Association of American Railroads ("AAR") *et al.* in the United States Court of Appeals, District of Columbia Circuit, (No. 76-1353) against Russell E. Train, EPA Administrator, to review the final regulations of EPA proposed January 14, 1976, to declare the same unlawful, and to require EPA to promulgate required regulations.

11. November 29, 1976; EPA filed Notice of Proposed Rulemaking concerning Railroad Noise Emission Regulations, 41 Fed. Reg. 52317-52320 (1976).

12. January 27, 1977; Comments of the AAR filed with the EPA, Office of Noise Abatement and Control, in reference to the November 29, 1976 Notice of Proposed Rulemaking, citing pendency of *AAR v. Train*; "Railroad Noise Emission Standards; Special Local Determinations," EPA Docket No. 76-10 (1977).

13. August 23, 1977; Decision issued in the case of *AAR v. Costle (Substituted for Train)*, 562 F.2d 1310, (D.D.C. 1977), directing EPA to reopen and reconsider Railroad Noise Emission Standards.

14. August 23, 1977; Compliance regulations promulgated by FDOT-FRA, effective October 1, 1977; 42 Fed, Reg. 42343-42349 (1977) (to be codified at 49 C.F.R. pt. 210).

15. April 17, 1979; EPA filed Notice of Proposed Rulemaking, Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, 40 C.F.R. pt. 201, pursuant to *AAR v. Costle;* 44 Fed. Reg. 22960-22972 (1979).

16. January 4, 1980; EPA promulgated Final Rule; Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, 40 C.F.R. pt. 201; adding §§ 201.14, 201.15, 201.16, 201.25, 201.26, 201.27, 201.08, and revising §§ 201.23

and 201.24, effective January 15, 1984, retaining regulations promulgated January 14, 1976 until January 14, 1984; 45 Fed. Reg. 1252-1271 (1980).

17. September 30, 1980; EPA published Notice of Availability of New Data and Advance Notice of Intent Concerning Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, (so-called "property line standards" for railroad yards), 40 C.F.R. pt. 201; 45 Fed. Reg. 64876-64877 (1980).

18. November 14, 1980; AAR filed extensive comments concerning objections to the September 30, 1980 Notice of Availability of New Data and Advance Notice of Intent.

19. November 12, 1981; Status Report prepared and filed by Attorneys for AAR, Attorneys for EPA and Attorneys for Intervenor (State of Illinois) in the U.S. Court of Appeals, District of Columbia Circuit No. 76-1353, *AAR v. Costle*.

20. November 24, 1981, Agreement to Dismiss, based upon the Status Report, filed in Case No. 76-135, *AAR v. Costle*.

21. November 22, 1982; EPA withdrew proposals of September 30, 1980; 47 Fed. Reg. 54107 (1982).

22. August 11, 1983; FDOT-FRA issued Notice of Proposed Rulemaking to revise scope of Railroad Noise Emission Compliance Regulations; 49 CFR pt. 210; 48 Fed. Reg. 36437-36493 (1983).

23. December 23, 1983; Final Rule promulgated by FDOT-FRA on Railroad Noise Emission Compliance Regulations; effective January 15, 1984; 48 Fed. Reg. 56757-56762 (1983) (to be codified at 49 CFR pt. 210).

B. Delaware Noise Control Act and Regulations.

1. Noise Control and Abatement Act adopted by Delaware General Assembly, 60 Del. Laws Chapter 648, Section 1 July 2, 1976; reenacted 63 Del. Laws Chapter 369, July 2, 1982; currently codified as 7 *Del.C.*, Ch. 71, §§ 7102-7125.

2. January 20, 1982, Regulations promulgated by Wilson, Secretary — DNREC; Regulations Amended July 8, 1982; currently Delaware Noise Control Regulations, §§ 71-1-1 through 71-1-8.

C. Federal Noise Control Act and Regulations Applicable to Motor Carriers.

1. Motor Carrier noise emission standards were first controlled by Public Law 92-574, enacted October 27, 1972. History of Statute in Item II.A.2., above.

2. Applicable Regulatory Standards, 40 C.F.R. pt. 202, were adopted October 29, 1974; 39 Fed. Reg. 38215-38216 (1974).

3. Applicable Compliance Regulations, 49 C.F.R. pt. 325, were adopted September 12, 1975; 40 Fed. Reg. 42437-42441 (1975).

III. TOFC OPERATIONS IN GENERAL

1. TOFC is a railroad acronym for "Trailers On (rail) Flat Cars".

2. COFC is a railroad acronym for "Containers On (rail) Flat Cars".

3. "Intermodal Facility" is a transportation facility which involves a change in the mode of transportation of freight; in railroad industry it involves TOFC or COFC operations or both.

4. A TOFC operation involves the transfer of loaded and sealed freight trailers from the backs of railroad flatcars to the ground, with subsequent connection to an over-the-road truck tractor or cab for continued transportation, and, conversely, the disconnection of a trailer attached to such a tractor or cab and the placement of said trailer upon the back of a railroad flatcar for continued transportation.

5. A COFC operation involves the transfer of loaded and sealed freight containers from the backs of railroad flatcars to the ground, to be placed on flatbed trailers connected to an over-the-road truck for continued transportation, and, conversely, the disconnection of the container from the flatbed trailer and the placement of said container upon the back of a railroad flatcar for continued transportation.

6. Overall TOFC or COFC movements also include other intermodal operations at shipping terminals where such trailers or containers are placed or loaded upon, or removed or unloaded

from, maritime vessels (ships or barges) for an initiation or continuation of transit in international or interstate commence; such maritime intermodal facilities generally do not directly involve railroad operations.

7. A "railroad facility" includes any area on which railroad equipment operates.

8. Railroad TOFC shipments are performed under "ramp-to-ramp" or "door-to-door" railroad contracts or tariffs.

9. Ramp-to-ramp shipments are performed under railroad movement waybills from one TOFC ramp where trailers are loaded onto railroad flatcars to another TOFC ramp where such trailers are unloaded from such flatcars.

10. Door-to-door shipments are performed under railroad contract and movement waybill from the shipper's plant via tractor cab to one TOFC ramp, onto rail flatcars, then off of such cars at another TOFC ramp, and via tractor cab drayage to consignee's warehouse or delivery point.

11. Ramp-to-ramp shipment sequence is generally as follows:

(a) Produce contracts with shipper.

(b) Shipper loads produce on trailers or containers leased or owned by shipper or onto units provided by the railroad and/or the drayage company(ies).

(c) Shipper arranges for railroad transportation by TOFC or COFC.

(d) Shipper delivers trailer or container to railroad ramping facility.

(e) Railroad transport shipment to destination specified in shipping document.

(f) Railroad delivers shipment to TOFC or COFC terminal, the designated off-ramp facility, either to the consignee or to the drayage operator specified in the shipping document.

12. The only difference between a "ramp-to-ramp" and "door-to-door" movement or shipment is that the railroad provides the drayage at each end of a trip which is "door-to-door," and the shipper specifies the drayage operator or contractor on a "ramp-to-ramp" shipment.

13. A "Movement Waybill" is a transportation document prepared by railroad personnel to accompany freight being delivered in interstate or intrastate commerce, depending upon the routing instructions given by the shipper or consignee on the shipping document; it identifies the shipment by trailer or container unit and number and by any "special price quotation."

14. A "shipping document" is the written transportation instruction given to the railroad or drayage operator by the shipper or consignee to transport the freight in intrastate or interstate commerce; it is prepared by shipper and accompanies the trailer until delivery to consignee.

15. The shipping document refers to the shipment by: (a) trailer or container numbers; (b) commodity description and quantity; (c) special price quotations (originated by railroad). The shipping document may also contain the time limits for deliveries, as dictated by the shipper or consignee.

16. Routing of shipment is dictated by Movement Waybill, and necessity of railroad classification, car consist and available routing. However, the Chessie System Railroads and the Seaboard System Railroads reserve the right to ship traffic over any route between origin and destination terminals.

17. In most cases, a separate movement waybill is executed for each trailer or container transported in TOFC or COFC Service. The exception to this practice is that a single movement waybill is issued for two trailers having identical "special price quotation numbers" and destinations and loaded on the same flatcar. When two trailer or container units are moved under one movement waybill, both unit numbers are shown on the waybill. Both the Chessie System Railroads and the Seaboard System Railroads otherwise treat each trailer or container as a separate movement, even in situations where a single shipment is contained in more than one trailer or container.

18. Any shipment between a shipper and a consignee may easily fill more than one trailer. In such situations, Chessie System Railroads treat each trailer or container tendered as a separate movement unless such trailers or containers are on the same flatcars. Freight bills, however, are generated on a per trailer or per container basis.

19. Since some delivery appointment times are not made until the units are enroute via rail, or, occasionally, even when the units are at the "destination" TOFC or COFC terminal, a movement Waybill or Shipping Document can be amended for time of delivery. However, the policy of the Chessie System Railroads (and Seaboard System Railroads) states that there are no reconsignments of shipments while enroute beween the origin and destination TOFC or COFC terminals.

20. Trailers, while located at the intermodal facility that is the subject of this litigation, are in interstate commerce.

21. Technological changes in the railroad industry over the last thirty (30) years have resulted in an increase in intermodal facilities and a shift in use from formerly exclusive-use rail equipment to more shipper-owned or third-party owned freight containers (including container boxes and trailers).

22. This trend in intermodal operations lowers a railroad's capital costs by using shipper-owned trailers and containers.

23. Railroads encourage shipper fleet ownership by adjusting transportation rates when shipper-owned equipment is utilized.

24. Use of refrigerated trailers in a TOFC operation involves a lesser chance of damage to or spoilage of perishable goods in transit than use of railroad box or reefer cars, by lessening occasions to physically load, unload or otherwise handle the same, or lessening opportunities for exposure to weather or other outside conditions.

25. The Chessie System Railroads maintain Intermodal Facilities at the following locations:

Baltimore, MD (Wicomico)

Baltimore, MD (Port Covington)

Chicago, IL

Cincinnati, OH (joint use with SBD, run by SBD)

E. St. Louis, IL (joint use with SBD, run by Chessie)

Grand Rapids, MI

Lordstown, OH

Louisville, KY (joint use with SBD, run by SBD)

Philadelphia, PA

Portsmouth, Va (joint use with SBD, run by SBD)

Richmond, VA

Toledo, OH

Wilmington, DE (Wilsmere)

Of these Facilities, only Baltimore (Port Covington) and Chicago Facilities have a present (December 1984) trailer capacity larger than that at Wilsmere.

IV. WILSMERE OPERATIONS

1. The present principal user of the Wilsmere TOFC Facility for the distribution of trailers which arrive inbound via rail flatcar, and exit via truck-tractor attachment, is Chessie Motor Express, Inc. ("CMX").

2. The present largest supplier of trailers which arrive inbound attached to truck-tractors, and depart outbound via rail flatcar, at the Wilsmere TOFC Facility is United Parcel Service, Inc. ("UPS").

3. Daily operations of the Wilsmere TOFC Facility include the removal of trailers from rail flatcars, the attachment of trailers to truck tractor cabs, the placement of trailers onto flatcars, the disconnection from truck tractor cabs, and the movement and temporary placing of trailers within the Facility as they await a change in transportation mode.

4. An independent truck terminal operator, Kane Transfer Company of Baltimore, Maryland ("Kane"), handles the daily

ramping service (lift-on, lift-off) and location/relocation of trailers within the Wilsmere TOFC Facility, through its own employees, under contract with B & O. Although Kane is engaged in interstate commerce, it is not a surface carrier by rail.

5. Kane uses seven (7) designated tractors (6-wheeled truck cabs) at the Wilsmere TOFC Facility to move and relocate trailers within the Facility, as follows: three (3) Capacity "Yard Jockey" diesel powered units on site November 1983; two (2) Ottawa "Model 30 diesel powered units, on site October 1982; one (1) Ottawa "Model 30" diesel powered unit, on site June 1984; and one (1) Ottawa "Model 30" gasoline powered unit, on site July 1984.

6. Each of the three (3) Capacity tractors have vertical exhaust systems manufactured by Stemko Campany (Part 190-9208); the four (4) Ottawa tractors have horizontal exhaust systems, manufactured by Stemko company (part number unknown); all industry approved sound mufflers.

7. Other equipment used by Kane at the Wilsmere TOFC Facility to service the piggyback train and truck interface are three (3) large side-loading forklift or crane style trucks ("sideloaders" or "piggypackers").

8. Each of the diesel sideloaders or piggypackers is equipped with industry approved sound mufflers, called "Cowl Silencers", cowl shrouds or mufflers manufactured by Temro Division, Budd of Canada, Inc. (Winnipeg, Manitoba). The "Cowl Silencers" were purchased from Diesel & Equipment Specialists Company (614 West Market Street, Bridegeville, DE 19933; Dale Braken), at the suggestion of Charles Wilkins, Delaware DNREC. The "Cowl Silencers" were installed on 2 of the sideloaders (one LaTourneau #2682-CH; one Raygo-Wagner #PC-90) March 13, 1984; the "Cowl Silencer" was installed on the third machine prior to delivery to Facility on August 8, 1984.

9. Operations of the sideloaders, piggypackers and designated tractor cabs are performed by employees of Kane.

10. 40 CFR pt. 201 does not set individual or specific standards for the noise emissions of sideloaders, piggypackers and/or designated tractor cabs.

11. Truck-tractor cabs are operated in and out of the Wilsmere TOFC Facility by each drayage (pick up and delivery) contractor.

12. CMX, under contract with B & O and other interstate rail carriers, provides pickup and delivery service (drayage) to and from the Wilsmere TOFC Facility under such railroad's door-to-door service.

13. UPS drays its own materials to the Wilsmere TOFC Facility (and from the receiving TOFC Facility) and contracts with B & O for ramp-to-ramp rail transportation out of Wilsmere.

14. Other independent trucking companies operate in and out of the Wilsmere TOFC Facility under drayage contracts with shippers or consignees who contract with B & O and other interstate rail carriers for ramp-to-ramp rail transportation service.

15. The drayage operators pickup or deliver trailer loads of freight to or from the Wilsmere TOFC Facility in accordance with the instructions of the shippers or consignees on the movement waybills and shipping documents presented to the drayers.

16. The combined drayage operators other than CMX average approximately 45 trailer loads per day at the Wilsmere TOFC Facility, on an annual basis subject to seasonal fluctuations.

17. "Door-to-door" shipments constitute approximately 60% of all shipments processed through the Wilsmere Facility; the remaining shipments are "ramp-to-ramp."

18. Approximately 35% of the trailers handled in "door-to-door" service at Wilsmere are privately owned, i.e., not owned or controlled (by lease) by a railroad. Almost all containers handled in "door-to-door" service at Wilsmere are similarly privately owned. Some of the trailers are leased to the transportation originating railroad. Some are owned by the shipper or consignee, if the shipper's or consignee's own traffic volume justifies such ownerships. Many are owned by investor groups or syndications, which in turn lease them to anyone who makes application, including shippers, consignees and railroads.

19. B & O, as other railroads engaged in trailer hauling, pays a trailer use charge to the trailer owner while the trailer is in the account of B & O, similar to the *per diem* charges paid or allowed

to owners of the other exclusive-use rail cars (boxcars, tank cars, hopper cars, gondola cars, automobiles racks, etc.).

20. B & O is responsible for all trailer use charges accrued from date of receipt of the trailer by B & O from a foreign (i. e. non-Chessie System) railroad or leasing company. B & O's responsibility for the trailer use charges ends when the trailer unit is either given back to the leasing company or interchanged (loaded or empty) back to the foreign railroad company.

21. The tractors used in "door-to-door" service are owned by the independent truckers. In the case of CMX, such tractors are owned by independent parties who subcontract their services to CMX.

22. Locomotives of B & O are operated in and through the TOFC facility by rail crews of the B & O.

23. B & O maintains an Assistant Terminal Manager at Wilsmere, who is responsible for all Facility operations and who reports to B & O's General Manager — TOFC-COFC operations in Baltimore.

24. B & O oversees operations at the Wilsmere TOFC Facility including clerical, administration, customer relations, interface with drayage contractors, supervision of Kane's operations, coordination of B & O Mechanical, Engineering and Transportation departments.

25. Trailers, including refrigerated trailers, are temporarily placed and/or "stored" at the TOFC Facility to accommodate whichever mode of transportation (rail or truck) is designed for the continuation of the journey of such trailer in commerce.

26. Employees of CMX are engaged in the drayage operation in and out of the Wilsmere TOFC Facility 7 days per week, Sunday through Saturday (excluding certain holidays).

27. CMX, as drayage operator, averages approximately 90 trailer loads per day at the Wilsmere TOFC Facility, on an annual basis subject to seasonal fluctuations.

28. The "Orange Blossom Special", a citrus and produce train originating in Florida on the SBD, commences rail movements in Florida around October 10 and runs through June.

29. During the peak season of the "Orange Blossom Special," (December through May), CMX moves an average of

3,000 trailer loads per month out of the Wilsmere TOFC Facility.

30. The refrigerated trailers used on the "Orange Blossom Special" service are leased or owned by SBD. Six hundred (600) are owned by SBD. Four hundred (400) are leased to SBD for 3 years by Brae Corporation; 100-200 others are on short term (30 day) leases. The 400 long-term leased trailers and 600 owned trailers are identified by unit numbers "RDSZ"; the others have various unit numbers.

31. CMX gross revenue is an average $250 per trailer load annually on all eastern seaboard traffic.

32. "Orange Blossom Special" traffic increases are reflected in the monthly schedules appearing at Section V paragraphs 1, 4, 7, 10 and 13 of this Stipulation.

V. STATISTICAL DATA — WILSMERE

1. The number of trains, both inbound to and outbound from the Wilsmere TOFC Facility within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound:	Outbound:
August	29	26
September	27	23
October	39	37
November	52	47
December	51	51
January	52	48
February	51	49
March	58	53
April	53	53
May	60	56
June	57	49
July	38	58
Totals	567	550

2. The average number of trains, both inbound to and outbound from the Wilsmere TOFC Facility on a daily basis, by day of the week is as follows:

Day:	Inbound	Outbound
Sunday	3	2
Monday	2	1
Tuesday	2	3
Wednesday	3	3
Thursday	3	3
Friday	3	3
Saturday	3	3

3. The average number of trains, both inbound to and outbound from the Wilsmere TOFC Facility within the 12-month period August 1, 1983 through July 31, 1984 by daily shift, were as follows:

Shift:	Inbound:	Outbound:
7:00 AM — 3:00 PM	1	—
3:00 PM — 11:00 PM	2	1
11:00 AM — 7:00 AM	—	2

4. The number of tractor trailers (truck cabs), both inbound to and outbound from the Wilsmere TOFC Facility via road or street access within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (at Gate):	Outbound (Gate):
August	1069	583
September	986	441
October	1249	547
November	1577	1103
December	2095	1753
January	1265	1000
February	1332	842
March	1537	1241
April	2292	1914
May	3402	3217
June	2577	2432
July	1722	1121
Totals	21,103	16,194

5. The average daily number of tractor trailer cabs, both inbound to and outbound from the Wilsmere TOFC Facility at the gate, by day of the week, based upon a traffic count on March 13, and 19, 1984, is as follows:

Day:	Inbound (Gate):	Outbound (Gate):
Sunday	30	54
Monday	66	84
Tuesday	64	55
Wednesday	89	75
Thursday	78	54
Friday	68	36
Saturday	56	32

6. The average number of tractor trailer cabs, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984, by daily shifts, were as follows:

Shift:	Inbound (Gate):	Outbound (Gate):
7:00 AM — 3:00 PM	12	18
3:00 PM — 11:00 PM	13	25
11:00 PM — 7:00 AM	29	25

7. The number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (Gate):	Outbound (Gate):
August	—	—
September	—	—
October	—	105
November	—	672
December	—	1232
January	—	632
February	1	526
March	4	809
April	5	1325
May	6	1945
June	1	816
July	14	20
Totals	31	8082

8. The average number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, by day of the week, is as follows:

Day:	Inbound (Gate):	Outbound (Gate):
Sunday	—	35
Monday	—	55
Tuesday	—	36
Wednesday	—	49
Thursday	—	35
Friday	—	23
Saturday	—	21

9. The average number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984, by daily shift, were as follows:

Shift:	Inbound (Gate):	Outbound (Gate):
7:00 AM — 3:00 PM	—	16
3:00 PM — 11:00 PM	—	8
11:00 PM — 7:00 AM	—	20

10. The number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (Gate):	Outbound (Gate):
August	1069	583
September	986	441
October	1249	442
November	1577	431
December	2095	521
January	1265	368
February	1331	316
March	1533	432
April	2287	589
May	3396	1272
June	2576	1616
July	1708	1101
Totals	21,072	8,112

11. The average number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, by day of the week, is as follows:

Day:	Inbound	Outbound:
Sunday	30	19
Monday	66	29
Tuesday	64	19
Wednesday	89	26
Thursday	78	19
Friday	68	13
Saturday	36	11

The average number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, by daily shift, were as follows:

Shift:	Inbound:	Outbound:
7:00 AM — 3:00 PM	12	2
3:00 PM — 11:00 PM	13	17
11:00 PM — 7:00 AM	29	5

13. The number of *outbound* (inbound on rail flatcar, removed at the TOFC Facility, and attached to truck tractor) *refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated as follows:

List of States	Number
Florida	8055
South Carolina	27
Total	8082

14. The number of *outbound* (inbound on rail flatcar, removed, and attached to truck tractor) *non-refrigerated* trailers for the periods August 1, 1983 through July 31, 1984 originated as follows:

List of States (*)	Number
Florida)	8112, No breakdown available
Alabama)	on per state basis
Georgia)	
North Carolina)	(*) As of July 16, 1984, one daily
South Carolina)	train arrives via St. Louis, with
Louisiana)	trailer traffic originating
Mississippi)	west of E. St. Louis, Illinois,
	with pickup at Cincinnati.

15. The number of *inbound* (brought to the TOFC Facility attached to truck tractor, detached, and placed on back of rail car) *refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated as follows:

List of States	Number
New Jersey	31 (all via CMX)

16. The number of *inbound* (brought to the TOFC terminal attached to truck tractor, detached, and placed on back of rail car) *non-refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated in the following states as follows:

List of States	Number
Delaware)	21,072, No breakdown
Pennsylvania)	available on per state
New Jersey)	basis
New York)	
Maryland)	
Connecticut)	
Massachusetts)	

VI. REFRIGERATED TRAILER DATA

1. Refrigerated trailers include those trailers capable of containing foods or other perishables therein in a frozen state, as well as such foods or perishables contained in a cool state or in a state of uniform temperature.

2. The refrigerated trailers are used to transport such produce and other perishables from point of origin to point of destination.

3. Refrigerated trailers, used in TOFC operations, vary in size from *lengths* of 40 feet to 45 feet; in *height* from 13 feet 4 inches to 13 feet 6 inches; and in *width* from 8 feet to 8 feet 6 inches.

4. Inside volume of the 45-foot long refrigerated trailers vary from 2808 cubic feet to 2926 cubic feet.

5. Spoilage rates for fruits, vegetables, foods, produce and other perishables (per publication of U.S. Department of Agriculture; USDA Handbook No. 105, "Protecting Perishable Foods During Transport By Motor Truck" (1970) and USDA Marketing Research Report No. 1122, "Shipping Alternatives for Moving Freight Products to Eastern and Western Ports (1982)) are dependent upon a multiplicity of factors, including:

— maturity of produce at harvest

— temperature of produce when loaded

— interior trailer temperature when produce is loaded

— humidity level of trailer

— heat and respiration of produce

— exterior temperature and humidity

— fluctuations in temperature in transit

6. Temperature settings of refrigerated trailers are established by shippers or consignees, and statutes and regulations of the U.S. Department of Agriculture.

7. Temperatures are required to be set in refrigerated trailers, used for cooling or maintenance of uniform temperature transportation of such produce and other perishables as follows (per publications of U.S. Dept. of Agriculture):

Food or perishable Class:	Temperature Setting:
Cabbage	32°F
Celery	32°F
Cucumbers	45-50°F
Oranges, Grapefruit	32°F
Tomatoes	55-60°F
Watermelon	40-50°F

8. Refrigerated trailers handled through the Wilsmere Facility are manufactured principally by:

(A) Great Dane Trailers, Inc. (912) 232-4471	Lathrop Avenue P.O. Box 67 Savannah, GA 34812
(B) Utility Trailer Company (915) 859-7906	P.O. Box 17970 El Paso, TX 79917

9. Air conditioners, coolers or compressors used in the refrigerated trailers handled through the Wilsmere Facility are manufactured primarily by:

(A) Thermo-King (612) 887-2236	312 W. 90th St. Minneapolis, MN 55420
(B) Carrier, Inc. ("Transicold" Division) (315) 432-6000	P.O. Box 4805 Carrier Parkway Syracuse, NY 13221

10. Air conditioners, coolers or compressors used on refrigerated trailers vary in size from 17,500 BTU to 37,500 BTU.

11. Most refrigerated trailers used for transportation of such produce and other perishables are owned by shippers, consignees, or trailer-leasing firms, which lease such trailers to shippers, consignees, investment firms or other parties.

12. The owner, or lessee under contract, of a trailer (whether refrigerated or non-refrigerated) is responsible for costs and expenses, including capital improvements and repairs to the trailer(s), absent negligent damage by a carrier.

13. In 1983-84 CMX leased or subleased about 400 of such refrigerated trailers from the owner(s), which CMX used or employed in the intermodal operations at Wilsmere. In 1984-85, such trailers are leased to SBD.

PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE

By _____

David S. Swayze
William E. Manning
Wendie E. Cohen
1310 King Street, P.O. Box 1328
Wilmington, Delaware 19899
(302) 658-5102

Richard C. Keene, OF COUNSEL
General Attorney
The Baltimore and Ohio
Railroad Company
100 N. Charles Street
Baltimore, Maryland 21201
(301) 237-3121

ATTORNEYS FOR PLAINTIFFS

By: _____

Fred S. Silverman
State Solicitor, State of Delaware
Michael T. Foster
John J. Polk
Deputy Attorneys General
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19899
Phone (302) 571-2520

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS, et al., *Petitioners,*	)	
v.	)	
DOUGLAS M. COSTLE, Administrator, Environmental Protection Agency, et al., *Respondents,*	)	No. 76-1353
The State of Illinois, *Intervenor.*	)	

STATUS REPORT

Pursuant to Section 17 of the Noise Control act of 1972 (Act), 42 U.S.C. §4916, on December 31, 1975, the Environmental Protection Agency (EPA) promulgated a final regulation setting noise emission standards for railroad locomotives and railcars operated by interstate carriers. 41 Fed. Reg. 2184. The Association of American Railroads (AAR) subsequently brought suit to require EPA to publish further noise standards for railroads. By decision of this court on August 23, 1977, 562 F.2d 1310, Respondents were directed to promulgate additional standards covering railroad "facilities and equipment."

On September 24, 1979, this Court granted Respondents' Motion For An Enlargement Of Time For Promulgating Final Standards. Respondents requested and received an extension until January 23, 1980, for publication of standards applicable to specific sources of railroad noise, and an extension until January 23, 1981, for publication of standards for overall limits on railroad noise (hereafter referred to as "property line standards"). The deadline for property line standards was further extended to May 26, 1981, by this Court's Order of February 13, 1981, and to November 26, 1981, by this Court's Order of June 26, 1981.

EPA promulgated the final standards for specific sources of railroad noise on January 4, 1980. 45 Fed. Reg. 1252. EPA also has published a Notice of Proposed Rulemaking for property line standards. 44 Fed. Reg. 22960-72 (April 17, 1979).

On September 30, 1980, EPA published a Notice Of The Availability Of New Data And Advance Notice Of Intent relevant to the property line standards, 45 Fed. Reg. 64876-77, and received in response extensive comments submitted by Petitioner AAR which, *inter alia*, raised the possibility that further standards might not be needed. AAR argued that the standards promulgated to date constitute complete and effective compliance with the statutory mandate for regulation of rail facility and equipment noise emissions "achievable through the application of the best available technology taking into consideration the cost of compliance" (42 U.S.C. §4916), and additionally questioned the feasibility of, and the necessity for, the proposed property line standards for railroad noise.

Following discussion of these matters with the parties and review of the standards currently in effect, Respondents have concluded that no further standards are necessary to regulate rail facilities and equipment. The standards already promulgated by EPA, including those in response to this Court's order, encompass numerous standards covering major sources of railroad noise: standards for locomotives manufactured before 1980, locomotives manufactured after December 31, 1999, and rail cars, 41 Fed. Reg. 2184; and standards for locomotive load cell test stands, switcher locomotives, retarders, and car coupling operations, 45 Fed. reg. 1252. No petitions were filed to review the standards promulgated after the Court's decision in this case.

Respondents believe that the cumulative effect of these standards, which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. Since the cumulative effect of regulating equipment used within railyards is also to regulate to

a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish furher property line facility emission standards specifically for railyards.

In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

For the above-stated reasons, the parties agree that EPA has satisfied the Order of this Court directing the promulgation of railroad noise standards and accordingly have agreed to dismiss this case.

Respectfully submitted,

Richard J. Flynn

Lee A. Monroe
Sidley & Austin
1730 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Attorneys for Association of
American Railroads, et al.

Nancy J. Marvel
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Samuel I. Gutter
Attorney
Office of the General Counsel
Environmental Protection Agency
Washington, D.C. 20460

Reed W. Neuman
Assistant Attorney General
State of Illinois
500 S. Second Street
Springfield, Ill. 62706

IN THE UNITED STATES COURT OF APPEALS
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ASSOCIATION OF AMERICAN RAILROADS, et al.,	)	
Petitioners,	)	
v.	)	
DOUGLAS M. COSTLE, Administrator, Environmental Protection Agency, et al.,	)	No. 76-1353
Respondents,	)	
The State of Illinois,	)	
Intervenor.	)	

AGREEMENT TO DISMISS

Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, Petitioner, Association of American Railroads, et al., Respondents, Administrator of the Environmental Protection Agency, et al., and Intervenor, State of Illinois, hereby file this Agreement of Dismissal to dismiss this action. Each party shall bear his own costs.

Respectfully submitted,

_____

Richard J. Flynn

_____

Lee A. Monroe
Sidley & Austin
1730 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Attorneys for Association of
American Railroads, et al.

Nancy J. Marvel
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Samuel I. Gutter
Attorney
Office of the General Counsel
Environmental Protection Agency
Washington, D.C. 20460

Reed W. Neuman
Assistant Attorney General
State of Illinois
500 S. Second Street
Springfield, Ill. 62706

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al. *Plaintiffs*	*	
vs.	*	CIVIL ACTION NO. 84-452-WKS
CHARLES M. OBERLY, III, Attorney General, et al. *Defendants*	*	

AFFIDAVIT

STATE OF MARYLAND :
: SS.
CITY OF BALTIMORE :

JOHN E. GILES, being duly sworn, deposes and states:

1. I am General Manager — TOFC/COFC Operations for The Baltimore and Ohio Railroad Company (hereinafter "B&O"), d/b/a one of the Chessie System Railroads ("CSR") and one of the plaintiffs herein, and have been General Manager - TOFC/COFC Operations since April 1, 1984, and have been employed by B&O in other marketing and management positions since November 1980.

2. As General Manager — TOFC/COFC Operations, I am responsible for the overall operation and management of all of the CSR TOFC and/or COFC terminals or facilities, including: supervising employees in administration, operation and marketing functions; general financial accountability; coordinating and developing cost and profit information; customer pricing; equipment allocation and maintenance; coordination of terminal or facility operations between CSR and the Seaboard System Railroads (SBD); terminal planning and development; negotiating contracts with connecting motor carriers, rail carriers, trailer leasing companies and other contractors; and I report directly to the Assistant Vice President — Intermodal.

3. As General Manager — TOFC/COFC Operations I maintain or have access to all records, including certain financial data, of B&O and other CSR relative to all CSR TOFC facilities and operations, and this Affidavit is made from personal knowledge and from such materials and records under my care.

4. The Intermodal Facility at Wilsmere, New Castle, Delaware is a TOFC operation, involving the interchange from railroad to truck mode, or truck to railroad mode, of sealed freight trailers which have travelled in interstate commerce and/or which will continue to travel in interstate commerce, without break in bulk or containment.

5. The preponderant majority of inbound-rail, outbound-truck, traffic annually at the Wilsmere Facility is perishable goods and produce (citrus, fruits, vegetables, and frozen meats) from southern U.S. growing regions destined for northeastern U.S. market distribution. Produce transportation season runs from October through June, with peak in March, April and May.

6. In July through September, the primary merchandise handled at the Wilsmere Facility is a general freight trailer mix, with perishable goods still comprising an average 3-5% of gross freight. The general freight trailer mix includes manufactured, finished and household goods (ex.: appliances, appliance parts, auto parts, machinery, tools, hardware, bulk paper rolls).

7. The perishable merchandise and foods (vegetables, fruits and meats) is transported in refrigerated trailers which are designed to preserve the merchandise and which are designed for use on both rail flatcar or as attached to truck tractor cabs.

8. Trailers containing perishable goods are designed and manufactured to include individual self-fueled continuous action generators or compressors to cool or maintain a constant temperature inside the trailer. Modern refrigerated trailer units are fully automated to control the internal temperature. The temperature controls are set at points of original load and are released only at points of unloading, with no change by B&O or Kane in transit.

9. Disengaging a trailer refrigeration unit during transit or storage will result in the total loss of all perishable cargo contained in the trailer.

10. Such refrigerated trailers are items of equipment used in railroad TOFC operations to perform certain functions formerly performed exclusively by or with railroad refrigerated boxcars (a/k/a "reefers" or "reefer boxes").

11. Similarly, other trailers are used in TOFC operations at Railroad Facilities to perform certain functions formerly performed exclusively by or with railroad boxcars or tank cars.

12. Trailers are stored on the rail ("topside" or "on car") or on the ground ("carside" or "trackside") only as long as necessary to accommodate whatever mode of transportation (rail or truck) is designed for the continuation of their interstate journey. Wherever possible, B&O, CMX and other users of the Facility synchronize the arrival and departure of trailer shipments so as *to minimize parking and storage time and maximize the competitive advantage to* be derived from delivering trailer loads to their destination faster than competing intermodal operations, interstate truckers, and air freight haulers. The longest trailer "turnaround time" in the Facility is 3 days; the average turnaround time is 3 hours.

13. Outbound-rail, inbound-truck traffic at the Wilsmere Facility originates from points in Delaware, New Jersey, New York, Pennsylvania and Maryland, destined for delivery to points in North Carolina south through Florida, and for points west through Ohio, Indiana, Illinois and the western U.S.

14. Inbound-rail, outbound-truck traffic at the Wilsmere Facility originates from various points in Florida north through Virginia, and from California east through Ohio, destined for delivery points in Delaware, Pennsylvania, New Jersey, New York, northeastern Maryland, the New England States and Canada.

15. The present principal user of the Wilsmere TOFC Facility for distribution of inbound-rail, outbound-truck traffic is Chessie Motor Express, Inc. ("CMX"), a corporate affiliate of B&O, and which continues the interstate transportation of the trailers by truck drayage to the north, west, east and south.

16. The present largest supplier of outbound-rail inbound-truck trailers to the Wilsmere Facility is United Parcel Service, Inc. ("UPS") which brings trailers for interstate transportation south to Florida points (Jacksonville, Orlando, Miami, et al.).

UPS trailers contain quantities of miscellaneous parcels of less than 75 pounds each, shipped by commercial and private individuals under their contracts with UPS, and consisting of various items (parts, personal items and jewelry, household goods, office supplies, etc., etc.).

17. Under contract with the U.S. Postal Service, B&O handles trailers of bulk mail in/out of Wilsmere, collected from the Philadelphia area, northern New Jersey and southern New York for rail transit west to Texas via East St. Louis, and inbound-rail from Texas, et al. to Philadelphia. This contract calls for incentive penalties for late shipments.

18. In 1984, 39,745 trailer loads were processed at the Wilsmere TOFC Facility. Based upon a 300 day (rail schedule) year, the *average* number of trailers handled off-rail to ground or truck, or onto rail, was 132 per day (10 U.S. Mail, 33 perishable produce, 89 general freight).

19. In 1984, total railroad traffic revenues of B&O and affiliated CSR from the Wilsmere Facility, for both ramp-to-ramp and door-to-door deliveries, totalled $11,235,842, or $37,452 per day (based on a 300 day rail year) with an average of $282.70 per trailer load based on 39,745 total units, on all contents mix, in and out, all directions. Such revenues are/were subject to reduction for drayage costs (to CMX), operator costs (to Kane), taxes, utilities and other operating costs.

20. B&O has contracted with an independent truck terminal operator, Kane Transfer Company of Baltimore, Maryland ("Kane"), to handle the daily in and out operations of the Wilsmere Facility, and Kane's operational accountability is to me.

21. In 1983-84 Kane operated the Wilsmere TOFC Terminal under a contract calling for payment based upon a "per man hour" rate. In 1984-85, Kane operates under a new contract calling for a "per unit (trailer) handled" rate. Kane's 1984-85 contract rate to B&O is/was based upon an average handling time of 30 minutes per trailer unit.

22. Intermodal operations began at Wilsmere in October 1982. Until August 1984, when the telephone news was received from our Wilmington local counsel that the Delaware DNR

planned to file some suit, no complaints about noises from TOFC or any other rail operations at Wilsmere had been made to B&O by any governmental body. Private parties voiced general complaints only at the town/county open meetings set up as part of the zoning process in 1983.

23. Area TOFC competition is offered by Consolidated Railroad Corporation ("Conrail") at Morrisville, New Jersey.

24. Other direct and indirect transportation competition arises from interstate truck lines, which are numerous, and air freight companies, which are also numerous, in the Wilmington area.

25. Other nearby B&O TOFC facilities include only Philadelphia to the north, and Baltimore to the south. If Wilsmere is shut down, the Philadelphia Fcility is physically incapable of handling any resultant, additional traffic, and use of the Baltimore Facility would not be feasible because of the non-competitive additional costs of drayage to and from northeastern markets in and out of Baltimore.

26. The delays in transportation generated by diversion to a smaller Facility, or the adjustment of B&O's intermodal transportation rates to include such added drayage costs, would result in a permanent shift of substantial intermodal traffic to other rail-truck intermodal routes or to other directly or indirectly competitive air or truck routes by the shippers, all at substantial and irreparable revenue loss to B&O as well as to the terminal operator and the drayage operators.

27. The long and narrow configuration of most of the Wilsmere Yard makes this Facility ideal for TOFC operations; however, it severely restricts the amount and location of space available for the temporary parking and storage of trailers awaiting rail or truck transfer. The location of the B&O tracks, and the permanent sidings for the loading and unloading of freight at the General Motors plant on the south side of the Wilsmere Facility, limit such storage and parking of trailers to the north side of the Facility and to the adjacent "Market Place" Parcel (see diagram attached as "Giles Exhibit A").

28. Based upon the Affidavit of B&O's hired environmental expert, Grant S. Anderson, which I have reviewed, and upon

analysis of the three phase compliance or "noise attenuation" program therein (A. cover the refrigerated trailers with certain shrouds or "ready made enclosures", which are yet to be designed and manufactured; B. erect a sound barrier or wall 20 feet or more in height; C. relocate the refrigerated trailers to a point 200 to 600 feet from the receptor measurement point, being the property line or the "M-2" or "M-1" zoning boundary line), the Wilsmere Facility would be forced to shut down completely if such compliance were required.

29. The reasons for such shutdown are as follows:

(A) There is not 600 feet width available for such relocation in the Facility, either in Elsmere from duPont Boulevard to Derrickson Run and from Derrickson Run to Little Mill Creek, or in New Castle County from Little Mill Creek to the southwest edge of Biden Park, and relocation to such a 600 foot distance from the northwest line of the "Market Place Property" would leave an available strip of only 120 feet wide and 480 feet long along Centerville road, capable of holding only about 40 trailers. The *average* daily number of trailers on the ground (2 A.M. report) is 182; peaks run 350-400. Even with only a 200' limit, the number of trailer spots in the Market Place property would be limited to 200 and the east end of the Elsmere portion limited to 200. However, projected track expansions in Elsmere and New Castle would eliminate nearly all of Elsmere spots.

(B) Aside from any engineering, aesthetic, zoning or permit limits, the amortized cost to build a 20-foot sound barrier and supports ($1.2 million), with no guarantee of compliance thereby, added to the CSR Wilsmere TOFC rates would price the Facility out of competition. The rough cost estimate of a 40-foot barrier ($4.8 million, or 4 times as much) is also prohibitive.

(C) Based upon the daily peak number (120) of refrigerated trailer units handled at Wilsmere, B&O or Kane would need to acquire at least 183 of the "shrouds" at a (theoretical) cost of $900-1,400 each, a cost to be added to

B&O trailer unit cost by Kane. Assuming the correctness of Mr. Anderson's estimate of 10 minutes to mount and 10 minutes to remove the "shrouds", utilizing a 3 person crew and small crane and truck for each, B&O or Kane would need ten (10) such crews, cranes and trucks, during the daily seasonal peak (March - April - May) to unload trains consisting of 120 refrigerated trailers on flatbed railcars in a reasonable 2 hour period. Utilizing only one such crew would require twenty (20) hours merely to unload such *peak* trains. Any load or unload time in excess of two (2) hours imperils the efficiency of subsequent train routing, switching, etc. Utilizing merely the daily *average* of refrigerated cars handled (33) a single such crew would require 5.5 hours to unload and load. However, since such trains come in six days per week, at any hour of the day or night, three (3) such crews would be required per day, one for each shift, or else the trailers would sit uncovered and running for 8-16 hours. The annual cost to rent one (1) crane and truck would be $41,460±. Only one crane and truck would be necessary if three (3) crews were spread over 3 shifts. However, for each additional crew on any shift, an additional crane and truck would be required. Based upon typical contractor crew costs ($9.00 per hour plus benefits), the annual cost of one (1) crew for all three (3) shifts would be $330,000.00±. Additional crews per shift would add $110,000± to such annual costs if necessary for a full year. We would estimate such need for the perishable products shipping season to be a bell-shaped curve, with a need for one (1) additional crew in October and June, two (2) crews per shift in November, three (3) to five (5) crews per shift in December, January, February and May, and as many as ten (10) crews per shift in March and April. Such estimated additional costs would be $9,200.00 per crew per shift, per month needed. Additional noise would itself be generated by the additional crane(s) and truck(s), required to place the sound shrouds on the trailers, but no cost has been developed to cure this. The additional annualized costs, including an amortization

of the cost of the shrouds, to B&O (directly or via an increase in Kane's contract unit cost to B&O) would be $10.00-$19.00 per trailer, based on the 1984 number of trailers handled above (39,745). Such unit costs, however, would be more dramatic if applied only to the refrigerated trailer traffic which generates them.

JOHN E. GILES

SUBSCRIBED AND SWORN to before me this 24th day of January, 1985.

NOTARY PUBLIC

My Commission expires:

EXHIBITS BEYOND EXHIBIT A OMITTED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE and OHIO RAILROAD COMPANY, et al., *Plaintiffs*	)	C.A. NO. 84-452 WKS
v.	)	
CHARLES M. OBERLY, III, et al., *Defendants.*	)	

AFFIDAVIT OF CHARLES W. WILKINS, III

Charles W. Wilkins, III, being duly sworn, deposes and says:

1. He was graduated from the University of Delaware in 1948 with a Bachelor of Electronic Engineering degree. In conjunction with an EPA noise program, he attended Noise Control Training in 1980 at the University of West Virginia and the University of Maryland. This training covered four areas: techniques of noise measurement, equipment available for the measurement of noise, recommended noise control regulations, and principles of noise abatement.

2. Following his graduation from the University of Delaware, Mr. Wilkins began working for Pratt and Whitney Aircraft/United Aircraft located in East Hartford, Connecticut in 1948. His position at Pratt & Whitney was as an experimental test engineer. In that capacity he also worked as a noise consultant in which he tested jet engines and developed a means of controlling engine noise.

3. In 1955 he was employed by the Industrial Division of Honeywell, Inc. in Philadelphia. There he was the market manager for scientific instruments. In this capacity he guided the development, manufacture, and sale of scientific instruments.

4. In 1980 he came to work for the State of Delaware at the Department of Natural Resources and Environmental Control, as the individual responsible for the development and implementation of Delaware's Noise Control regulations. He is an environmental engineer with the State and performs a number of duties in this capacity. One of these duties was the development of Delaware's noise regulations, referred to in the Stipulated Factual Memorandum at II. B. 2 at page 8.

5. The development of Delaware's noise regulations was accomplished under an EPA program to assist states in promulgating noise standards consistent with federal law. Mr. Wilkins' development of Delaware's current noise regulations was accomplished in conjunction with the EPA, with the particular assistance of an EPA official named Patrick Anderson. In addition, a Noise Advisory Subcommittee, comprised of individuals representing industry and local government participated in development of the regulations which were promulgated by Secretary Wilson. Attached as Exhibit A is a list of the members of the Noise Advisory Subcommittee.

6. In 1980 he collaborated with Quest Instruments to develop sound level measuring instruments for motor vehicle noise emissions. These efforts culminated in the production of a device which is now used in the motor vehicle inspection lanes operated by the Delaware Department of Transportation. Mr. Wilkins has assisted local governments in developing their noise emission regulations. He has lectured to state police officers and liquor control commission agents concerning noise emission testing equipment and has trained such groups in the use of this equipment. Moreover, Mr. Wilkins is responsible for the maintenance and calibration of the State's noise testing equipment.

7. Periodically during May and June, 1984, Mr. Wilkins visited the vicinity of the Wilsmere Intermodal Facility to conduct noise testing. To perform the measurements he used several instruments: a Soltect recorder model 6723, serial #B14369; General Radio sound level meter model 1988, serial #4121; 1560-P42 pre-amplifier, serial #4605 (set at X1); 1962-9610 microphone, serial #12552; and a General Radio Minical Calibrator model 1987, serial #0394. For each measurement Mr. Wilkins

centered his equipment with respect to the railroad. He also calibrated the instruments before and after each test in accordance with procedures accepted by EPA. The purpose of calibration is to make sure that the instrument is working accurately. Each calibration for every test disclosed that the equipment was functioning properly.

8. Under the Delaware Noise regulations, to determine whether there is a violation, it is necessary to obtain readings of the area background noise level without the additional noise contribution of the specific source being tested (the "ambient noise"), as well as of the noise level when the noise emitted by the source is added to the ambient level.

9. The regulation which pertains to Leq measurements, specifically, Table 1 in Section 6.01, contains a misleading form of nomenclature. The title of Table 1 is "Sound Levels by Receiving Land Use Zone, Leq (24) dBA". The indication of "24" as the number of hours to be averaged only applies to the first two categories on the chart, specifically Receptors C and B, industrial and commercial uses, respectively. Receptor A is plainly marked to be used in averaging over specific periods of time throughout a given day, because the "A" class applies to residential areas. The obvious reason for distinguishing the time periods as marked, is to allow for lesser noise in the nighttime hours, so people can sleep without disruption from excessive noise.

10. Mr. Wilkins attempted to obtain an ambient noise level reading at several locations in residential neighborhoods in the vicinity of the Chessie yard on May 14, 17, 25 and 31, but failed because the noise emitted by refrigerator units at the Wilsmere Intermodal Facility drowned out all other noise sources.

11. On May 14, 1984, Mr. Wilkins took noise emission readings from locations #2, #5 and #7. Attached as Exhibit B is a map of the Elsmere area on which these locations are marked. Location #2 is the testing site which was closest to the noise source at that time; it is sited in front of the Wilson residence at 500 Woodward Avenue. Employees of Bolt, Beranek and Newman ("BNN") were present when these readings were made. This was the only occasion on which BBN representatives were

present during Mr. Wilkins' testing. The emissions from the refrigeration units averaged 78-79dBA for this period for all locations. Mr. Wilkins equates this level to the noise one would hear standing next to a highway as a stream of trucks passed in incessant review. It is a continuous rumble.

12. On May 17, 1984, Mr. Wilkins again obtained an average noise emission reading on refrigeration units in the Wilsmere Intermodal Facility. The reading on this date was taken during the daytime from location #2. Refrigeration unit noise emissions averaged 79dBA on this occasion.

13. Mr. Wilkins obtained an average 78dBA noise emission reading from the refrigeration units on May 25, 1984. He took this reading from location #2 between 10:45 and 10:50 a.m.

14. On June 8, 1984, at between 10:45 and 11:00 a.m., Mr. Wilkins succeeded in obtaining an ambient noise level reading at location #2. On this occasion, the refrigeration units nearest location #2 were not operating. Other units and machinery on the Wilsmere facility were operating and any noise generated by such equipment was included in the ambient noise level reading of 52dBA.

15. In Mr. Wilkins' opinion, these tests show that, at the time and place of the reading, the most significant noise emissions from the Wilsmere yard were caused by the refrigeration units and not by rail cars or locomotives.

16. Paragraph 6.02 of the Delaware regulations prohibits any source from emitting a sound level more than 10dBA above the ambient level measured at the point of complaint origination. The ambient level is obtained by taking the reading when the sound source or sources, are turned off. The readings obtained by Mr. Wilkins demonstrate that shutting off just one sound source from the Wilsmere Facility, the refrigeration units, resulted in a difference in the sound level of 26-27dBA. Since the factors which are measured as part of the ambient noise level will be very nearly identical on any given day, the selection of any one day to measure ambient noise will not result in a significantly different ambient noise level reading than any other day at a particular location.

17. In taking readings from this particular source, Mr. Wilkins used the Soltec graphic recorder. This device records all noise and graphically reflects, on chart paper, extraneous noises as sharp peaks. Readings are taken to ascertain the level of particular noises as well as the average noise in a particular area, over a given period of time. These values are calculated by analyzing the values on the graph, including any peaks. Certain peaks, which represent extraneous noises such as a car door slamming or an airplane flying overhead, are not included in the averaging process. Through this process, only relevant noise is measured.

18. The Delaware regulations and, most specifically, their established method of noise emission measurement are consistent with accepted engineering principles concerning noise emission and measurement.

19. All of the measurements recorded by Mr. Wilkins in the vicinity of the Wilsmere yard were taken for the purpose of ascertaining the intensity of the noise in the area. The secondary purpose was to discuss these noise levels with Chessie representatives, in anticipation of working with those individuals towards abatement and control of the noise.

20. Mr. Wilkins does not have the authority to independently commence enforcement actions. If he determines that a particular source of noise may be in violation of the Act and regulations, he first discusses the matter with the owner of the source, in hopes of working with that person towards abatement. If this approach is not practicable, Mr. Wilkins first refers the matter to the appropriate police department for enforcement action. Only when the police do not take action, would a case be referred to the Department of Justice, through the legal office of DNREC for enforcement action.

21. Prior to the commencement of this litigation, Mr. Wilkins, with the assistance of a diesel specialty company, worked towards successful reduction of noise generated by the cranes in the Wilsmere yard. At the time this civil action was commenced, he was planning to continue his investigation into

the other sources of noise in the yard, in hopes of achieving reduction of noise levels with the cooperation of Chessie representatives.

22. On August 14, 1984, Mr. Wilkins went to the vicinity of the Wilsmere yard for the purpose of taking photographs. Attached as Exhibit C is a photograph of the yard taken from the Route 141 bridge facing east. The photograph accurately depicts the scene in the yard, as he viewed it that day. Attached as Exhibit D, is a photograph of the area which was formerly the parking lot of a drive-in movie theatre, and was then being filled and graded for use as a parking lot for trailers. The photograph was also taken from the Route 141 bridge, facing north-east, and accurately depicts the scene as he viewed it that day.

23. On January 22, 1985, Mr. Wilkins returned to the vicinity of the Wilsmere yard for the purpose of taking additional photographs. Attached as Exhibit E is a photograph taken from the same location as the photograph attached as Exhibit C and it accurately depicts the scene as he saw it that day. Attached as Exhibit F, which is another photograph taken on January 22, 1985. It was taken from the same location as the photograph attached as Exhibit D, and accurately depicts the scene as he viewed it that day.

24. On January 28, 1985, Mr. Wilkins took several aerial photographs from a helicopter flying over the Wilsmere yard. Attached as Exhibit G is one such photograph which shows a view of the entire yard. Attached as Exhibit H is another photograph taken on January 28, 1985 which shows an aerial view of the parking lot, which is shown in the photographs attached as Exhibits D and F. The photographs attached as Exhibits G and H accurately depict the scenes as Mr. Wilkins viewed them on the day they were taken.

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Charles W. Wilkins, III

Subscribed and sworn to before me this 30th day of January, 1985.

_____

Notary Public

NOISE ADVISORY SUBCOMMITTEE

Michael C. Ferguson
City Planner
800 French Street — 8-1-571-4659
Wilmington, Delaware 19801

Leon de Valenger, Jr.
Director
League of Local Governments
P.O. Box 484 — 678-0991
Dover, Delaware 19901 — Mary Molek, Asst. Dir.
Judy Goldsmith, Sect.

Donald Witmer, Engineer
436 CES/DEEV
Dover Air Force Base — 678-6351
Dover, Delaware 19901

Terry Dear, Senior Consultant
Occupational Environmental Control
Engineering Department
E. I. duPont de Nemours & Company, Inc.
1382 Louviers Building — 8-1-366-3655
Wilmington, Delaware 19898

Paul R. Stoffer
Manager, Employee Benefits
Administration
ICI Americas, Inc. — 8-1-575-3246
Wilmington, Delaware 19897

Grover A. Biddle
Delaware Development Office
Townsend Building — 678-1506
Dover, Delaware 19901

Exhibit A